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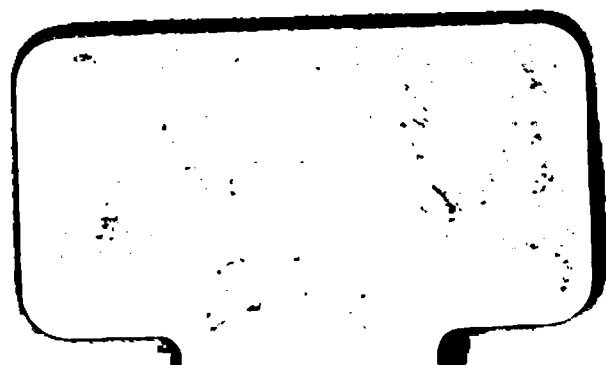
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A  
**PRACTICAL TREATISE**  
ON THE  
**LAW OF BAIL,**  
IN  
**CIVIL AND CRIMINAL PROCEEDINGS.**

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By **CHARLES PETERSDORFF, Esq.**  
OF THE INNER TEMPLE.

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1824.

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*B. Bensley, Bolt Court, Fleet Street.*

**TO**  
**THE HONOURABLE**  
**SIR JOHN BAYLEY, KNIGHT,**  
**ONE OF**  
**HIS MAJESTY'S JUSTICES**  
**OF THE COURT OF KING'S BENCH,**  
**&c. &c. &c.**  
**THIS TREATISE**  
**IS**  
**MOST RESPECTFULLY INSCRIBED.**





## P R E F A C E.

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**THERE** are, perhaps, few parts of the Law of England more closely identified with the ordinary course of human affairs than the subject of the following Treatise. Almost every individual is, on some occasion, either in compliance with the dictates of friendship, or in obedience to the requisitions of expediency, called upon to bear the onerous responsibility of becoming Bail. Hence the author is induced to believe, that an attempt to unfold more minutely than has hitherto been effected the nature of the Law of Bail, the principles upon which it is founded, and the practical rules connected with its administration, will be received by the profession with indulgence.

Although the various works on the Practice of the Courts, include a considerable portion of the matter comprised in the ensuing pages; yet from the extreme condensation requisite to be observed in publications of that description, the materials are necessarily collected and detailed in them rather as a series of distinct and arbitrary precepts, than as constituting a well digested and comprehensive system, supported by just and ra-

tional principles. Several recent publications have, therefore, been presented to the profession, confined exclusively to particular and different branches of the practice of the courts, in which the writers have enumerated and discussed the grounds and principles of each rule, or decision, instead of simply stating them as abstract propositions. The Law of Bail appeared to the author peculiarly susceptible of such a detailed investigation; and he has consequently, in the present attempt, endeavoured not only to arrange the whole of the law on the subject, so as to render it a perspicuous and connected system, but has laboured to expound the reasons and to lay before the reader the basis upon which the decisions have proceeded, and the rules of court been introduced.

Anxious attention has been devoted to render the work practically useful; and with a view of facilitating the researches of the *Magistrate*, an alphabetical table of bailable and non-bailable offences has been introduced in the text of the criminal division of the work, with notes succinctly disclosing the law connected with each particular crime or misdemeanor.

*New Court, Temple, April 1824.*

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### ***ERRATA.***

**Page 3, line 20, for " a " read " an."**

**89, line 19, between " that " and " arbitration," insert " persons attending upon."**

**96, line 23, for " conditionally," read " unconditionally."**

**178, line 19, for " as general," read " as a general."**

**PRACTICAL TREATISE**  
**ON**  
**THE LAW OF BAIL**

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**PART THE FIRST.**

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**BAIL IN COMMON LAW ACTIONS.**

**CHAPTER I.**

**ON THE ORIGIN, PROGRESS, AND GENERAL NATURE OF THE  
LAW OF BAIL.**

**DURING** the early periods of our Constitution, and whilst the feudal polity prevailed in its ancient integrity, little attention was directed to the improvement of the law of personal property. Arts, manufactures, and commerce were comparatively unknown. The majority of the people were feudatories, and the wealth of the more opulent members of the state, consisted of possessions less mutable and of a more permanent nature than mere personal chattels. Land, was the only species of wealth, that could be esteemed valuable in the opinion of a people, whose time, when not employed in military occupations, was devoted to the pursuits of agriculture. From these circumstances, civil injuries to personal property, were not only insignificant in number, but unimportant in their consequences, when contrasted with the progressive augmentation, which succeeded the abolition of the feudal tenures.

The gradual introduction and increase of trade, and the consequent accumulation of wealth, enriching and aggrandizing the industrious classes of the community, soon enlarged and strengthened general credit. Civil employments and occupations necessarily became more extended, and the relative situation of the people made it no longer indispensably requisite, to devote such a rigid attention to military avocations. It was not until an alteration so conducive to the general advancement of society had taken place, that attempts were made to correct the insufficiency of the existing laws, and to obviate the inconveniences attending their execution. By degrees, new remedies were introduced, through the medium of legislative and judicial interference.

To prevent inconvenience resulting to the lord from the coerced absence of his dependants, the person of a vassal, according to the feudal system, was not liable to be attached for civil injuries. This exemption, which had presented many obstacles against improvement in the law, was in effect removed by the first act of parliament, which authorized the arrest and detention of a person for injuries unaccompanied by violence.

By the common law, a defendant was not amenable to process against his person for civil injuries, unless in cases of aggressions committed with force or *vi et armis*; in which case he was subject to a writ of *capias ad respondendum*.

At the period of which we are now writing, when any member of the community sustained an injury which demanded redress through the interposition of the superior courts of law, he sued out of the Court of Chancery an original writ, containing a concise statement of the wrong he had sustained, and commanding the sheriff of the county where the injury arose, or was supposed to have been committed, to require the person charged with

the offence, either to do justice to the complainant, or to appear in court and answer the accusation to be exhibited against him.

Of these original writs there were two, a *Præcipe* and a *Si te fecerit securum*: the former applicable to cases where something certain was demanded; the latter where nothing specific was required, but a general satisfaction for some aggression, which a court of justice could not determine without the intervention of a jury. But before the sheriff was permitted to execute either of these writs, he was ordered to take security from the aggrieved party for the prosecution of his suit with effect. This salutary precaution was adopted, to guard and protect the accused from any injury that might result to him, from the institution of a groundless and untenable complaint. The security required to be given by the plaintiff for pursuing his claim with effect, were not merely nominal, but real and substantial pledges: persons capable of indemnifying the party from the mischievous consequences which might accrue, from the exhibition of a unfounded or malicious charge.

Upon a return, to either of these writs, that the defendant had been summoned by the sheriff, an attachment issued to compel a due acquiescence with the command in the original writ. This attachment and all other subsequent writs were called *process*, because they proceeded from the original or first institution of a complaint. They were witnessed in the name of the chief justice of the court of common law, founded on the non-appearance of the defendant, according to the object and exigency of the original writ.

But, in actions of trespass for injuries accompanied with force, the attachment was part of the original writ, and peremptorily commanded the person charged with

infringing the peace, to be attached without any preliminary summons or monition. In either case, if the accused did not answer, he not only forfeited the goods thus attached, but was compellable to appear, by distresses successively renewed, called a *distringas* infinite. The defendant, if he had any substance, was thus gradually deprived of it, till he acted in obedience with the king's writ; or, if he had no property, the law, considering him incapable of rendering satisfaction, looked upon all further process as nugatory; in which case, in actions for injuries without force, the process terminated.

A different practice however prevailed with regard to injuries committed *vi et armis*. Such aggressions required, in the state of society at that period, more prompt and speedy relief than mere breaches of contract: process by *capias ad respondendum* was provided against the person of the offender, if he omitted or neglected to appear to the writs of original and attachment, or had no effects which could be distrained. But as this unrestricted immunity of the defendant's person in matters of contract rather encouraged than intimidated indigent and fraudulent wrongdoers, a *capias* was at length provided, by which the defendant could be arrested for injuries as well of a pecuniary as of a forcible nature.

The earliest statute which gave this remedy for injuries unattended by a breach of the peace, was the statute of Marl. 23. in the 52 Hen. 3. (a) which enacted, "that if bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands or tenements, whereby they may be distrained, then their bodies shall be taken, so that the sheriff shall cause them to make

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(a) This is the generally received opinion, but Mr. Reeve in his valuable History of the English Law, doubts the accuracy of this conjecture. See Vol. II. p. 459. Vol. I. p. 480.

their account." This act was circumscribed and confined in its operation, to the now almost obsolete action of account, and was not followed by any new regulation, till the 11 Edw. 1. c. 1. commonly called "the statute merchant;" which rendered the person of the debtor liable to arrest, if he had not sufficient goods and chattels to satisfy the claims against him. It was soon, however, ascertained that this enactment would prove abortive, and frustrate the object of its introduction, as it induced the debtor to conceal his personal chattels and live exclusively on his land. A statute was therefore passed in the thirteenth year of the reign of the same king, permitting execution to issue against the body, lands, and goods of persons indebted on bonds or other specialties, but whose effects nevertheless could not be sold, until three months had elapsed, from the time of suing out the execution; and if at the expiration of that period the creditors were not satisfied, they were authorized to detain him in prison and keep possession of his lands until their debts were liquidated. (b)

By the statute 25 Edw. 3. c. 17. a writ of *capias* was extended to actions of debt and detinue; and it was not until the expiration of one hundred and fifty years, after the extention of the right to arrest the person of the wrongdoer in trespass, account, debt, and detinue, that a corresponding privilege was given in actions on the case. This material alteration was effected by the 19 Hen. 7. c. 9. enacting "that like process be had hereafter in actions upon the case in any of the courts, as in actions of trespass or debt." Immediately after the introduction of this mode of procedure, the *capias* came into general use in all cases of private wrongs, without any attention

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(b) See the Statute of Merchants, 13 Edw. 3. stat. 3. chap. 1.

being directed to the distinction of peaceable injuries, and those attended with violence. By these acts of the legislature this difference was removed; and the usual and ancient method of suing out the original writ and attachment, and having them returned by the sheriff, fell gradually into disuse, and ultimately became a mere legal fiction. As a substitute for real and substantial pledges, so rigidly and cautiously required by the old law, from complainants, before their demand for redress was put in suit, the feigned names of John Doe and Richard Roe were adopted. To the fictitious original and attachment, the sheriff was supposed to return *nil habet*; that the defendant had nothing whereby he could be summoned, attached, or distrained; and the monition intended to be given to a defendant, when proceeded against by original, was thus progressively relinquished and finally abandoned.

According to the law as it then stood, a defendant was liable in all cases whatsoever, to be arrested in the first instance by *capias*, without any previous intimation of the justice of the demand, the nature of the injury, or the extent of the loss sustained by the complainant.

On the first establishment of the *capias* as the ordinary process of commencing suits, it was not unfrequently abused by being applied to purposes of oppression and extortion. Men found it an easy mode of indulging their vindictive feelings against those whom they wished to deprive of their liberty. Chicanery and artifice were resorted to as the means of obtaining unjust compositions from parties who were confined in prison on pretended claims. This facility in misapplying the process of the law arose from two concurrent causes: 1st, From the writ not describing the cause of action, but merely suggesting a *quare*



*clausum fregit*, under the idea of a supposed trespass, to give the courts jurisdiction: 2dly, From its not being necessary for the plaintiff to give security for the prosecution of his claim. To such an excess were these abuses grown and yet tolerated, that sometimes no such person as the alleged complainant existed, but fictitious names were used. From these concomitant circumstances, persons were often unjustly detained in prison from inability to obtain sureties for their appearance on the return-day of the writ. These sureties, from the nature of the engagement by which they were bound, were denominated MAINPERNORS, (c) or BAIL, (d) and were responsible for the appearance of the defendant in court, on the day mentioned in the process.

These words have been often used indiscriminately, without attending to the distinction; that *bail* have the power of imprisoning the principal, or surrendering him before the stipulated day of appearance; and that *mainpernors* can do nothing, but are barely and unconditionally sureties, for his due attendance in court, on the day mentioned in the writ. Bail are only sureties that the party will be answerable for the special matter for which they stipulated. Mainpernors are bound to produce him to answer all charges whatsoever. From this distinction between the words, it will be seen that *mainprize* is of more extensive signification than bail; but as the law respecting the former has now become rather a subject of erudite investigation, and speculative curiosity, than of

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(c) In Wood's Inst. 610. *mainprize* is thus described, "*manu captio*, signifies taking a man into friendly custody, who might otherwise be committed to prison, on security given for his appearance at a time and place, and is supposed to go at large without any fear of being taken by his manucaptors." See also 1 Bac. Ab. 205.

(d) The word Bail is derived from the French *Bailler* (to deliver), because the defendant is bailed or delivered to his sureties, upon their becoming responsible to satisfy the condemnation and costs, or render the defendant to prison. But see 4 Inst. 178. where Lord Coke says, it is derived from the French noun *Bail*, a guardian, keeper, or gaoler.

practical interest, it is unnecessary in this place to say more than briefly to notice the writ of mainprize, which was directed to the sheriff, commanding him to take sureties for the appearance of the defendant, and on obtaining such security, to liberate him from confinement.

In the then incomplete state of the law, this writ was a most valuable and essential privilege; for among the many deficiencies and imperfections of our ancient system of jurisprudence, none was more conspicuous, than the arbitrary power allowed to the sheriff, of refusing or accepting bail, as caprice might suggest, or avarice dictate.

The right to issue a writ of mainprize was the only mode by which a party, detained on mesne process by the sheriff, could obtain a restoration of his liberty; but the delay and expense unavoidably incident to such proceedings, led to many inconveniences which were not effectually removed until the passing of the celebrated clause in the stat. 23 Hen. 6. c. 9. which provided, that sheriffs and all other officers and ministers, should let out of prison all manner of persons arrested by them, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by causes of indictments of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons were let to bail or mainprize, to keep their days in such places as the said writs, bills, or warrants required, with an exception of the following persons, namely, those in ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, surety of the peace, those committed by special commandment of any justice, and vagabonds refusing to serve according to the statute of labourers: and that the sheriff or officers before mentioned, should not take

an obligation for the above causes, or by colour of their office, but only to themselves and by the name of their office; and upon condition written, that the prisoner should appear at the day and place contained in the writ, bill, or warrant; and all other obligations taken by colour of their office were declared void; fourpence being the utmost he was allowed to take, for making such obligation, warrant, or precept. It was further ordained, that all sheriffs should yearly appoint a deputy in the Courts of Chancery, King's Bench, Common Pleas, and Exchequer, to receive all writs and warrants to be delivered to them, and this was to be done before they returned any writs. Any of the above officers violating this act were to forfeit to the party grieved treble damages; and moreover forty pounds, half to the king and half to the party grieved.

As the effect of this act, and the construction it has received from the courts, will be noticed in a subsequent chapter, whilst treating of the bail bond and relative duties of the sheriff, it will suffice here to observe, that when a defendant has been arrested and is in actual custody, it is the duty of the sheriff to take bail if required; and therefore, if a bail bond be tendered with sufficient sureties, and the sheriff refuse to accept it, and to liberate the defendant, he is liable to a special action on the case for damages. Although the sheriff was thus compellable by the statute to liberate the defendant, on receiving an offer of responsible bail, it afforded no check against demanding bail bonds for exorbitant sums. Evils of this magnitude imperatively called for amendment, and were at length endeavoured to be corrected by an act in the 13th year of Charles II. st. 2. c. 2. which was introduced by the legislature, with a view of diminishing this extraordinary system of oppression; it enacted, "That no

person arrested by any sheriff, &c. by force or colour of anyailable writ, bill, or process, wherein the certainty and true cause of action was not expressed particularly, should be compelled to give security for his appearance, in any penalty or sum of money, exceeding the sum of forty pounds."

But this act, which nearly deprived the Court of King's Bench of its jurisdiction over civil injuries, accomplished only a small portion of its intended purpose; for it was still as unrestrictedly in the power of a person actuated by malicious resentment, to persecute the object of his hatred, by suggesting a fictitious cause of action where no real one existed, as, we have before seen, he might have issued a writ, without alleging any particular cause of complaint. The only check against such an abuse arose from the liability of the party to pay costs, and the remote probability of the person injured instituting an action for a malicious arrest; but the latter consequence was too distant and uncertain to afford any effectual protection.

This power of perverting the object of legal process to mercenary and nefarious purposes, continued uncontrolled until the 12 G. 1. c. 29. which act was amended by the 5 G. 2. c. 27. made perpetual by the 21 G. 2. c. 3., and extended to inferior courts by the 19 G. 3. c. 70. in which it was enacted, that in all cases where the cause of action should not amount to the sum of ten pounds or upwards, and the plaintiff or plaintiffs should proceed by way of process against the person, he, she, or they should not arrest or cause to be arrested the body of the defendant or defendants; but should serve him, her, or them personally, within the jurisdiction of the court, with a copy of the process; upon which should be written, in English, a notice to such defendant, of the intent and meaning of such service,

for which no fee or reward should be demanded or taken : provided nevertheless, that in particular franchises and jurisdictions the proper officer there should execute such process : and that in all cases, where the plaintiff's cause of action should amount to the sum of ten pounds or upwards, an affidavit should be made and filed of such cause of action, which affidavit might be made before any judge or commissioner of the court out of which process should issue, authorized to take affidavits in such court, or else before the officer who should issue such process or his deputy ; which oath such officer or his deputy were empowered to administer, and for such affidavit one shilling over and above the stamp-duties should be paid, and no more ; and the sum or sums specified in such affidavit, should be indorsed on the back of such writ or process, for which sum or sums so indorsed, the sheriff or other officer to whom such writ or process should be directed, should take bail, and for no more : and that if any writ or process should issue for the sum of ten pounds or upwards, and no affidavit and indorsement should be made as aforesaid, the plaintiff or plaintiffs should not proceed to arrest the body of the defendant or defendants, but should proceed in like manner as was directed by the statute 12 G. 1. in cases where the cause of action did not amount to the sum of ten pounds or upwards. The sum for which an arrest could be made was extended by the 51 G. 3. c. 124. s. 1. to fifteen pounds, over and above any costs incurred in suing for the same.

In the cursory view that has been taken of the law of arrest in civil cases, it cannot fail to be a source of surprise, that at the present day, by operation of the more recent statutes, an arrest cannot be had in the only form of action, wherein it was anciently allowed. For as

those acts require the demand to be *certain and specific*, to hold a defendant to bail, no arrest can be made without a judge's order, for a cause of action arising out of a forcible injury, where the damage must necessarily be uncertain, and incapable of arithmetical computation.

As it did not unfrequently occur that persons arrested upon mesne process were not able to find sufficient sureties for their appearance, and were yet capable of making a deposit of the money for which they were arrested, the statute 43 Geo. 3. c. 46. s. 2. was introduced; in which, after reciting that it is expedient that persons arrested should, upon making such deposit, be permitted to go at large until the return of the writ, without finding bail to the sheriff for their appearance at the return thereof; it was enacted "that all persons who shall be arrested upon mesne process, within those parts of the United Kingdom of Great Britain and Ireland, called England and Ireland, shall be allowed in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him or to his undersheriff or other officers, to be by him appointed for that purpose, the sum indorsed upon the writ, by virtue of the affidavit for holding to bail in that action, together with ten pounds in addition to such sum, to answer the costs which may accrue or be incurred in such action, up to, and at the time of the return of the writ; and also such further sum of money, if any, as shall have been paid for the king's fine upon any original writ; and shall thereupon be discharged from such arrest, as to the action in which he, she, or they, shall so deposit the sum indorsed on the writ."

Although in this historical sketch of the Origin and Progress of the Law of Bail, the corresponding topic of the

Law of Arrest has been occasionally introduced, for the purpose of more satisfactorily explaining and illustrating the general nature of the former ; yet it is not intended in the subsequent parts of this treatise, to advert to the law of arrest, any further than may be incidentally required, to explain with clearness and precision the more immediate object of investigation—the Law of Bail.

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## CHAPTER II.

OF THE CAUSE OF ACTION, AND OF THE PARTICULAR FORMS OF ACTION, IN WHICH A PARTY MAY OR MAY NOT BE HOLDEN TO BAIL.

### SECTION I.

#### *Of the Cause of Action.*

IN the preceding attempt to give a brief and historical outline of the Origin, Progress, and General Nature of the Law of Bail, it has been shewn, that by several recent legislative enactments, the right-conferred on the creditor of holding his debtor to bail, can only be exercised where the demand amounts to a specific and limited sum. Whether the sum thus limited and prescribed by the existing law be or be not sufficiently large, has not unfrequently been made the subject of parliamentary discussion. In these debates, some animadversions not unmixed with invective have been introduced, on the supposition, that the amount of the debt required to vest in the creditor the right of holding his debtor to bail, is disproportionate and unequal to the improved state, and increased extent of commercial credit ; but as the duration of the principal act is limited

to the 1st of Nov. 1823, and from thenceforth, until the end of the next session of parliament, an early opportunity of revising this important branch of the law will be afforded, if it should be deemed expedient.

As the present practice is entirely regulated by the 11 & 12 W. 3. c. 9. s. 2., and 51 Geo. 3. c. 124. s. 1. and one or two other statutes applicable only to particular classes of the community, it will be unnecessary here to advert to the rules and principles adopted at common law, or to the regulations established by the earlier parliamentary provisions. (a)

The act of the 51 G. 3. c. 124. s. 1. (b) before alluded to, enacts that "no person shall be held to special bail, where the cause of action in any court shall not amount to the sum of 15*l.* exclusive of any costs, charges, and expenses, that may have been incurred, recovered, or become chargeable, in or about the suing for, or recovering the same, or any part thereof, (except where the cause of such action shall arise or be maintainable, upon or by virtue of any bill of exchange or promissory note;) and that no special writ nor any process, specially therein expressing the cause of action, shall be sued forth or issued from any court, in order to compel any person to appear thereon in such court; and all proceedings and judgments that shall be had, on any such writ or process, shall be, and are thereby declared to be, void and of no effect."

The exception in the act respecting bills of exchange and promissory notes, was introduced in order that those instruments might remain on the same footing as established by 12 G. 1. c. 29., which required, "that the sum due on a bill or note should amount to 10*l.*"

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(a) 52 Hen. 3. c. 23. and West. 2. (13 Ed. 1.) c. 11. 25 Ed. 3. c. 17. 19 Hen. 7. c. 9. ante p. 4.

(b) Continued by the 57 G. 3. c. 101. until the 1st day of Nov. 1823, and thenceforth until the end of the next session of parliament.



The words in the 51 G. 3. c. 124. s. 1., "that the proceeding shall be void and of no effect," do not avoid the proceedings where the plaintiff arrests the defendant for 15*l.* and recovers less. (c) That act and the previous statutes therein recited, apply only to the affidavits, and not to the sum recovered in the action; therefore where a plaintiff holds a man to bail for less than 15*l.* without an affidavit, the proceedings would be void; but where a plaintiff arrests on an affidavit and recovers less than 15*l.* if there be any ground for relief, it must be derived from the 43 G. 3. c. 46. s. 3. \*

In *Wales*, and the *Counties Palatine*, by 11 & 12 W. 3. c. 9. s. 2., "no sheriff shall hold any person to special bail, upon any process, issuing out of the courts at Westminster, unless an affidavit be first made and filed of the cause of action, and that the same is twenty pounds and upwards, and bail shall not be taken for more than the single sum expressed in the affidavit." This statute, it appears, is not repealed or altered by any of the subsequent acts. In one case (d) it is said that the Court of Common Pleas took time to consider the question, but in a subsequent case in the same reports, (e) they expressed a clear and decided opinion that the 11 & 12 W. 3. was not virtually repealed by the 12 G. 1. c. 29., as the affirmative words

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(c) *Spink v. Hitchcock*, 1. B. Moore, 131. s. c. 7. Taunt. 435.

\* By which it is enacted, "That if a defendant shall have been arrested and held to special bail (without probable cause) in any action, wherein the plaintiff shall not recover the sum for which the defendant was arrested—the defendant shall be entitled to costs, under a rule of court, and the plaintiff be disabled from taking out execution for the sum recovered in such action, unless such sum shall exceed the amount of the taxed costs of the defendant." In *Glenville v. Hutchens*, Michas. Term K. B. 1822, where a person had been arrested for a sum of money, including a demand for board and lodging at two guineas a week, and the evidence at the trial was of an agreement to pay one guinea per week, the court directed the plaintiff to pay the defendant his costs. MS.

(d) *Lord Molineux v. Charles*, Barnes, 69.

(e) *Rayner v. Brough*, Barnes, 89.

in the latter act, could not be considered sufficient to repeal an antecedent law, where the nature of the circumstances, and the intent of the legislature were obviously the same. (*f*)

To secure persons engaged in the naval service, from interruption in the discharge of their duties, the 1 G. 2. s. 2. c. 14. s. 15. enacts that “no petty officer, or seaman, “marine, or noncommissioned officer of marines, on “board any of his Majesty’s vessels, shall be holden to “bail, or arrested in execution for any debt whatsoever, “contracted subsequently to his having entered the service, nor for any debt under 20*l.* contracted previously “to his having so entered.” (*g*)

The annual mutiny acts introduce the same regulation as to soldiers, which the above statute prescribes respecting seamen and marines. (*h*)

But the statutes, except the limitation of the sum for which bail may be demanded, are not restrictive of any authority, antecedently exercised by the courts in respect to the holding to bail, but were enacted merely as a check on the plaintiff; they therefore leave the practice of arresting under a special order of the court, precisely as it stood prior to their being passed. (*i*) In the construction of these statutes, the general rule adopted by all the courts is consistent and uniform; that where the cause of action arises from a debt, or money demand, or where it sounds in damages, but the damages are capable of being ascertained with certainty, by mere arithmetical computation, the defendant may be holden to bail as of course; but on the other hand, where the cause of action consists merely in a right to recover some damages, but those damages

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(*f*) *Smith v. Dudley*, 2. Strā. 1107.

(*g*) See 32 G. 3. c. 23. s. 22. 44 G. 3. c. 13. (*h*) See post, chap. 3.

(*i*) *O’Mealy v. Newell*, 8 East 364.

are general, indefinite, and undetermined, or incapable of being reduced by calculation to a proper degree of certainty, without the intervention of a jury, the defendant cannot be holden to bail unless under the particular circumstances, and subject to the preliminary restrictions which will be noticed in a subsequent part of this work. Indeed the acts themselves appear in terms, though not expressly, to confine and limit their operation, to cases arising out of pecuniary claims, and matters of contract. (k)

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## SECTION II.

### OF THE PARTICULAR FORM OF ACTION IN WHICH A PARTY MAY OR MAY NOT BE HOLDEN TO BAIL.

#### 1st. *In Form ex Contractu.*

IN an action of assumpsit, it may be stated as a general principle, that the defendant may be holden to bail, whenever the demand intended to be enforced is capable of being rendered certain, as "for goods sold and delivered," "money lent," or other similar specific claim. The qualifications ingrafted on this general rule, and the decisions which may seem to militate against it, will be noticed, whilst enumerating the various demands, which usually constitute the subject-matter of that action.

The statement of an account, and adjusting the balance, ascertain and establish with precision, the amount due from the debtor to his creditor, and give the latter a specific demand against the former, for which he may be holden to bail.

In assump-  
sit.

On an ac-  
count stated,  
and where  
there have  
been mutual  
dealings.

The balance thus struck, is considered as the debt at

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(k) *Le Writ v. Tolcher*, Barnes 79. *Reynoldson v. Blades*, id. 108.

1st. In Form  
ex Contractu.

law, as well as in equity; but where there have been mutual dealings between the parties, and the account continues open and undiquidated, the party cannot be holden to bail for the amount due, on the debtor side of the account only, without making such deductions, as the defendant would be entitled to avail himself of, as a set-off. Holding the debtor to bail, without allowing for counter-claims, is looked upon as a mere evasion. (a) This doctrine was fully recognised in a recent decision, (b) where it was determined, that if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items, clearly due on the other side of the account, it is an arrest without reasonable and probable cause within the 43 G. 3. c. 46., and as such, the plaintiff was bound to pay the costs according to the provisions of that act. Yet where the defendant in such a case had refused to furnish any account of the work done by him for the plaintiff, the Court of Common Pleas considered, that the plaintiff was justified in holding the defendant to bail for the full amount of the goods sold to him. (c)

It seems that where cross demands are separate and distinct, and the party to whom the larger sum is due, arrests the other for the balance only, and the latter arrests the former for the smaller sum due to himself, no action will lie for maliciously holding to bail, though such conduct would be considered by the court as highly vexatious and reprehensible. (d)

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(a) Dr. Turlington's case, cited in 4 Burr. 1996. The party making such an affidavit, it seems, might be indicted for perjury, 4 Burr. 1996.

(b) Dronefield v. Archer, 5 B. & A. 513. 1 Dow. & Ry. 67. S. C.

(c) Germain v. Burrows, 5 Taunt. 259.

(d) Brown v. Pigeon, 2 Campb. 594. sed vide Dronefield v. Archer, 5 B. & A. 513. Dr. Turlington's case, 4 Burr. 1996. Middleton v. Hill, 1 M. & S. 240. Feely v. Reed, 5 B. & A. 515, n.

The 12 G. 1. c. 29. requires that the sum due on bills of exchange and promissory notes should amount to 10*l.*, otherwise the defendant cannot be holden to bail; this regulation we have seen is not altered or affected by the 51 G. 3. c. 124. s. 1. which renders it necessary that the debt in other cases should amount to 15*l.*

1st. In Form  
ex Contractu.  
On Bills of  
Exchange,  
and Promis-  
sory Notes.

A right of action accrues immediately to the holder of a bill or note, against all the antecedent parties, either on its nonacceptance or nonpayment; and if such a security be transferred to the holder by mere delivery, without indorsement on account of a precedent consideration, the party who delivered it, may be holden to bail for the original debt, as well as any other party to the bill or note, either successively or all at one and the same time.

Where part of the amount secured by the instrument has been paid, the party should only be holden to bail for the balance. When a bill or note is payable by instalments, and it contains a clause, that on failure of payment of any one instalment, the whole shall become due, the holder is entitled to the security of bail for the whole amount of the sum for which it was given; (e) but where the instrument does not contain such a clause, the right to bail is limited to the instalment due at the commencement of the action. (f)

After part  
payment of  
the bill, &c.  
Bill, &c.  
payable by  
instalments.

Where goods have been sold and actually delivered to the defendant, though under a special agreement, provided the contract was to pay in money, and the period of credit be expired, the purchaser may be holden to bail as of course; (g) but where the right of action is derived from the breach of a special agreement, as to receive or deliver goods, and the damages sought to be recovered are of

For goods  
sold and de-  
livered.

(e) Beckwith v. Nott. Cro. Jac. 504. Rudder v. Price, 1 H. Bl. 547.

(f) Ashford v. Hand. And. 370.

(g) Brooke v. White, 1 N. R. 330. Swancott v. Westgarth, 4 East 75.

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ex Contractu.

an indefinite and unliquidated description, special bail cannot be obtained unless a judge's order be first granted for that purpose. A party, therefore, cannot be holden to bail for goods *bargained and sold*, on the ground, that it would be unreasonable, that the plaintiff should have the security of the defendant's body under arrest, and also retain the security of the goods in his own hands; (*h*) but if two tradesmen agree to deal with each other by way of barter, or, in other words, enter into a contract of exchange, if one of them refuse to state and deliver an account, the other may hold him to bail, for the whole value of the goods, which he has furnished to the party refusing to balance the unsettled demands. (*i*) Where the goods are delivered on the terms of sale or return, and the person receiving them does not return the property in a reasonable time, the party it is conceived might be holden to bail for the value of the articles, as for goods sold and delivered. (*k*)

When by the terms of a contract of sale, payment is to be made by a bill at a stipulated date; as the vendor's remedy, on the purchaser's refusal to accept the bill, is a special action on the contract for the non-acceptance, and not a right to sue by an *indebitatus assumpsit* for the price of the goods; the vendee cannot be holden to bail; though at the expiration of the period the intended bill had to run, he may be sued, and the security of bail obtained in an action for goods sold and delivered. (*l*) But care must be taken to distinguish transactions of this kind from the common cases, in which goods are sold, and a

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(*h*) *Hopkins v. Vaughan*, 12 East 398.

(*i*) *Germain v. Burrows*, 5 Taunt. 259.

(*k*) *Bailey v. Gouldsmith*, Peake 56. See *Bromley v. Coxwell*, 2 B. & P. 438. *Catlin v. Bell*, 4 Campb. 183. *Hunter v. Welsh*, 1 Stark, 224. *Campbell v. Sewell*, 1 Chit. Rep. 609.

(*l*) *Mussen v. Price*, 4 East 147. *Dutton v. Solomonson*, 3 B. & P. 582. *Brooke v. White*, 1 N. R. 330. *Hoskins v. Duperoy*, 9 East 498.

bill taken in payment, payable at a future day, but *without any express agreement for time*, for the payment of the goods. In the last-mentioned case, if the bill is dishonoured, the drawer may be sued immediately, upon the original cause of action, without any regard being had to the time which the bill had to run; for there being no agreement as to time, the party takes the bill as payment, and if it turn out good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately. (m)

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ex Contractu.

With respect to debts for work and labour, or other personal services, where the stipulated duties have been performed on the part of the plaintiff, and the remuneration is to be in money, the defendant may be holden to bail as of course; but where the remuneration sought to be recovered, is not strictly for work and labour actually done, or if the contract has not been executed by the plaintiff, although the defendant prevented its performance, as the declaration must be special (n) and the damages uncertain, the security of bail cannot be obtained.

For work  
and labour.

It seems, that formerly no action could have been maintained at law, where a surety had paid the debt of his principal, (o) except he had a counter security; (p) but a different rule prevailed in courts of equity; (q) and by the custom of London, where the surety paid a debt and had no counter-bond, he might maintain an action for money paid to the defendant's use, upon the implied

On con-  
tracts to in-  
demnify.

(m) Puckford v. Maxwell, 6 T. R. 52. Owenson v. Morse, 7 T. R. 64. Stedman v. Gooch, 1 Esp. 5.

(n) Hulle v. Heightman, 4 Esp. 77. 2 East 145. s. c. See Appleby v. Dods, 8 East 300. Wilkinson v. Frasier, 4 Esp. 183. Waugh v. Carver, 2 H. Bl. 235.

(o) Toussaint v. Martinnant, 2 T. R. 100.

(p) Laver v. Nelson, 1 Vern. 456.

(q) Ibid. Com. Dig. Chancery, 4 D. 6.

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exContractu.



contract. (r) This equitable principle has since been universally recognised and admitted by the courts of law. In the principal case on the subject, Ashhurst, J. said, "there is no doubt that wherever a person gives a security by way of indemnity for another, and pays the money, the law raises an *assumpsit*. (s) From these cases it is therefore clear, that where a surety is called upon to pay money, on behalf of his principal, that he is entitled to hold the latter to bail; but this right, positive and immutable as it is, where there has been an actual payment of money, becomes questionable and surrounded with some difficulty, where the surety upon being called on to pay, gives as a substitute for money, a *security* to the creditor; these circumstances have given rise to the question, whether he can recover and hold the principal to bail, as for money paid to his use before actual payment. In a case at Nisi Prius, Lord Kenyon, C. J. held, that such an action might be maintained by a surety who had given a promissory note, payable with interest for the debt of the principal, and which the creditor accepted as payment, although the sum secured by the note was not paid. A motion was afterwards made for a new trial, but the Court of King's Bench agreed with his lordship, and refused the rule. (t)

Upon the authority of this case, however, the subsequent decision in *Taylor v. Higgins*, (u) although not positively contradicting it, has thrown much doubt. There the plaintiff as surety for the defendant, had given a bond and warrant of attorney to the creditor, in discharge of the debt of his principal, which security he swore was accepted in payment and satisfaction of the debt. The question which arose upon this case was, whether the

(r) *Lay v. Nelson*, 1 Vern. 456. Com. Dig. Chancery, 4 D. 6.

(s) *Toussaint v. Martinnant*, 2 T. R. 104. and see *Hicks v. Richardson*, 1 B. & P. 93. *Hodgson v. Bell*, 7 T. R. 97. *Houle v. Baxter*, 3 East 183.

(t) *Barclay v. Gooch*, 2 Esp. 571, 572.

(u) 3 East 169.



plaintiff was entitled to hold the defendant to bail, for money paid, &c. by him to the defendant's use. For the plaintiff, the above-mentioned case of *Barclay v. Gooch*, was cited, and the case of *Israel v. Douglas*, (x) was also mentioned as establishing the same principle upon that case; Lawrence, J. observed, that it had been since mentioned in the court, (y) and not approved of, upon that point.

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ex Contractu.

Upon the principal case, Lord Ellenborough said, "There is no pretence for considering the giving this new security as so much money paid for the defendant's use: supposing even the case of the note of hand, or bill of exchange, as the current representative of money, to have been rightly decided; still this security consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." (z)

The above case has been fully confirmed by the subsequent one of *Maxwell v. Jameson*, (a) in which it was resolved; that where one of the makers of a joint promissory note, after the same had become due, gave his bond to the holder for the amount; but before the commencement of the action, no money was actually paid on the bond; that until he had paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution, against any of the other makers of the original note.

The case of *Barclay v. Gooch*, (b) must now therefore be considered as a very questionable authority, and perhaps the better opinion is, that since the case of *Taylor v. Higgins*, (c) it would not be considered as law. (d)

(x) 1 H. Bl. 239.

(y) *Johnson v. Collings*, 1 East 98.

(z) *Taylor v. Higgins*, 3 East 172.

(a) 2 B. & A. 51.

(b) 2 Esp. 571.

(c) 3 East 169.

(d) See Fell on Guarantee, Appendix, No. 1.

1st. In Form  
ex Contractu.

On other  
special con-  
tracts.

For the breach of special contracts, by which no specific claim is created, but the only medium of collecting a knowledge of the nature of the injury, and the extent of the loss sustained, is the partial, and erring judgment of the party wronged, the defendant cannot be held to bail; (e) as it would be unreasonable that he should be subjected to a deprivation of his liberty, merely because the plaintiff supposes he has sustained considerable damage, and either from irritated or malignant feelings, is induced to swear to any imaginary loss. In particular cases, where a strict adherence to the above rule would produce injustice, a special order to hold the party to bail may be obtained on an application to the court, or a judge at chambers, on a full affidavit of the circumstances.

For penalty  
or stipulated  
damages.

Where a forfeiture given for the breach of an agreement is in the nature of stipulated damages, the defendant may be held to bail; but the agreement, breach, and that the forfeiture is stated damages and not a penalty, must distinctly appear from the affidavit. (f) The rule is clear, that for stipulated damages the defendant may be holden to bail but not for a penalty. (g) In these cases a difficulty has sometimes occurred, in distinguishing between penalties and liquidated damages. The general principles to be collected from the cases are ably deduced by Mr. Holt, in a note to his *Nisi Prius Reports*. (h) From which it appears, that

1st. Where a sum of money, whether in the name of a penalty or otherwise, is introduced in an agreement,

(e) *Edwards v. Williams*, 5 Taunt. 247. See *Brook v. Trist*, 10 East 358. *Cope v. Cooke*, Doug. 467.

(f) *Stinton v. Hughes*, 6 T. R. 13. *Hatfeild v. Linguard*, 6 T. R. 217. *Willey v. Thornton*, 2 East 409. *Kettelby v. Woodcock*, Barnes 86.

(g) Per *Ellenborough, C. J.* in *Willey v. Thornton*, 2 East 410.

(h) *Holt's N. P.* 45, n.

merely to secure the enjoyment of a collateral object; the enjoyment of the object is considered as the principal intent of the contract, and the penalty only as accessory, and therefore only to secure the damage really incurred.

1st. In Form  
ex Contractu.

2d. Where an agreement contains provisions for the performance of several things, and then a large sum is stated at the end of it, to be paid upon the breach of performance, it will be considered as a penalty.

3d. Where the payment of a smaller sum is secured by a larger.

4th. Where the word penalty is specifically used, it is merely as a security, and will effectually prevent the court from considering the sum mentioned as liquidated damages. (i)

5th. A court of equity will relieve against a penalty upon a compensation, and a court of law will not enforce it beyond the actual damage sustained; but where there is an agreement to pay a particular liquidated sum, neither a court of equity nor a court of law can make a new agreement for a man, nor is there any room for compensation or relief.

6th. Where the precise sum therefore is not of the essence of the agreement, the *quantum* of damages may be assessed by a jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damages, the jury are confined to it, and the plaintiff cannot recover beyond it. (k)

From these general rules, the conclusion is simple and obvious, that where the stated damage is the real debt and

(i) *Smith v. Dickenson*, 3 B. & P. 630.

(k) See *Harrison v. Wright*, 13 East 343. *Astley v. Weldon*, 2 B. & P. 346. *Lowe v. Peers*, 4 Burr. 2229. *Fletcher v. Dyche*, 2 T. R. 32. *Wilbeam v. Ashton*, 1 Camp. 78. *Cotterel v. Hooke*, Doug. 101. *Winter v. Trimmer*, 1 Bl. 395. *Bird v. Randall*, Ibid. 373. 387. s. c. 3 Burr. 1352. *Hardy v. Martin*, 1 Br. Cas. in Chan. 419. *Sloman v. Walter*, Ibid. 418.

1st. In Form  
or Contractu.



the essence of the contract, the party may be holden to bail; but where the stipulated sum is to operate merely in *terrorem*, (l) and as a security, the right to the protection of bail is limited to the legal debt, that is the amount actually due, and not the stipulated forfeiture.

Where the  
legality of  
the contract  
is doubtful.

When it is a matter of uncertainty, whether the agreement intended to be enforced be not illegal, and which might eventually subject the plaintiff himself to a penalty, the defendant should not be held to bail, as the court under such circumstances would discharge the latter out of custody, on entering a common appearance. (m)

It was urged in the case from which the above rule is extracted, that it was improper that a question, arising out of the legality of the contract, and on which the whole merits of the case might depend, should be discussed on a summary application, and not put upon the record; but the court in answer to this objection said; where the plaintiff has the defendant in custody, and the cause of the arrest, as communicated in his own affidavit, appears by reference to the security on which the debt arises; that it would be improper to detain the party in prison, the contract which is the foundation of the action being void. If the contract were not only void but mischievous, the law might be evaded, if the plaintiff were permitted to retain the advantage which he has gained over the defendant, and make use of the opportunity of treating with him while in confinement; for possibly the merits of the case might then never meet the examination of a court of justice. This decision has since been recognized in the Exchequer, where that court discharged a defendant on common bail, because there appeared a probable

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(l) Per Lord Mansfield in *Bird v. Randall*, 3 Burr, 1352, s. c. 1 Bl. 373. 387.

(m) *Sumner v. Green*, 1 H. Bl. 301.

ground, that the securities intended to be relied upon were illegal. (n) 1st. In Form  
ex Contractu.

The courts here never give greater or less effect to agreements entered into in a foreign country, than they would receive from the law of the state in which they were made; (o) for what is not an obligation in one place, cannot by the municipal regulation of another country, become so in another place. It would seem, therefore, the privilege of having the security of bail on contracts made in parts beyond sea, is co-extensive only with the right of arresting and detaining the person of the debtor abroad. In the case of *Melan v. The Duke de Fitzjames*, (p) the principal case on the subject, the rule as above stated is sanctioned by the concurrent opinion of Eyre, C. J. and Rooke, J. the former there said, it has been very often repeated, and I wish it were more clearly understood, that the court does not mean to try the question between the parties on these preliminary motions. (q) But it is a very different case when the ground of the debt is a transaction in a foreign country, it does not then originate in our law, but in the law of *that country* which creates the obligation. That law must be laid before us by evidence, since we do not take notice of it of course. When it is sworn, that a party is indebted on a bond or promissory note, we know what the nature of those instruments are, and the law concerning them; or if for goods sold and delivered, we know that goods sold and delivered may create such a debt. But if the plaintiff

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(n) *Wightwich v. Banks*, Forrest 153.

(o) *Burrows v. Jemino*, 2 Stra. 733. *Gienar v. Meyer*, 2 H. Bl. 603. *Robinson v. Bland*, 2 Burr. 1077. *Folliott v. Ogden*, 1 H. Bl. 123. *Mostyn v. Fabrigas*, Cowp. 174. *Melan v. De Fitzjames*, 1 B. & P. 141. *Talleyrand v. Boulanger*, 3 Ves. 447. *Alves v. Hodgson*, 7 T. R. 241. *Potter v. Brown*, 5 East 130. *Whittingham v. De la Rieu*, 2 Chit. Rep. 55.

(p) 1 B. & P. 138. *Johnson v. Machielsne*, 3 Campb. 44.

(q) *Earlier v. Languishe*, 2 Chit. Rep. 55.

1st. In Form  
exContractu.

swear positively to a debt in this country, and refers to something which renders it ambiguous, whether there be a debt or not, the party ought not to be held to bail. Heath, J. dissented from the opinion given by the Chief Justice, and observed, "we all agree that in construing the contracts, we must be governed by the laws of the country in which they are made, for all contracts have a reference to such laws. But when we come to remedies, it is another thing; these must be pursued, by the means which the law points out where the party resides. The laws of the country where the contract was made, can only have a reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country, voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws on his particular engagements." The principle established in the case of *Melan v. The Duke de Fitzjames*, had been introduced in a previous adjudication, (r) in which the majority of the judges negatived the right of the creditor to have bail under such circumstances, but considerable doubt has been thrown upon these decisions in consequence of Lord Ellenborough in a recent case (s) having intimated his dissent to the doctrine contained in the principal case, and expressed his approval of the opinion entertained by Heath, J. Upon this intimation it is observable, that the question then under discussion was not strictly analogous to the circumstances which gave rise to the decision in the Common Pleas, and that the dissent of Lord Ellenborough was expressed, not at a time, when the propriety of that determination could be fully and satisfactorily investigated, but merely when adverted to by counsel in argument, for a collateral purpose. It

(r) *Debalse v. Mackenzie*, Barnes 73. 2 Stra. 1243. s. c.

(s) *Imlay v. Ellefsen*, 2 East 456. See post.

is therefore conceived that the rule as above stated, may yet be considered as law, and which is to a certain degree sanctioned by the Acts of Parliament, inhibiting the arrest of aliens. (t)

1st. In Form  
ex Contractu.

As a policy of insurance is merely a contract of indemnity, a defendant cannot be holden to bail either for a total or partial loss, unless there has been an adjustment or express promise to pay the loss; and this rule obtains, although the defendant may have made an unqualified offer to pay a part of it, on the ground, that the action is in its nature, no more than a claim for unliquidated damages, upon a contract of indemnity. (u)

On policies  
of insur-  
ance.

It is a general principle of law, that an action will not lie on a mere order or rule of court. (x) On this principle the Court of Common Pleas determined, that a defendant could not be holden to bail, in an action founded on the prothonotary's allowance of costs. (y)

On allocatur  
for costs.

The right to bail in an action of covenant is regulated and governed precisely by the same rules as the action of *assumpsit*. Thus when the covenant is for the payment of a sum certain, as for the arrears of an annuity, mortgage-money, rent, &c. the covenantor may be holden to bail as of course; but where the breach of covenant is for not repairing or not indemnifying, or for similar breaches, and the amount of damages uncertain; the defendant cannot be holden to bail, without a special order be obtained for that purpose.

In covenant.

As the action of debt is in legal consideration, a remedy for the recovery of a debt *eo nomine et in numero*, and not

In debt.  
General  
rule.

(t) 38 G. 3. c. 50. s. 9. 41 G. 3. c. 106. 42 G. 3. c. 92. 55 G. 3. c. 54.

(u) *Lear v. Heath*, 5 Taunt. 201. s. c. 1 Marsh, 19. and see *Cumming v. Forester*, 1 M. & S. 494.

(x) *Emerson v. Lashley*, 2 H. Bl. 248. *Smith v. Whalley*, 2 B. & P. 484. *Carpenter v. Thornton*, 3 B. & A. 52.

(y) *Fry v. Malcolm*, 4 Taunt. 705. See *Anon Lofft*, 305.

1st. In Form  
ex Contractu.

strictly for a compensation in damages, though generally awarded for the detention of the debt; it follows, that in an action of debt on simple contract, where the sum due amounts to 15*l.* the defendant may be holden to bail.

On bonds  
generally.

In debt on bond, conditioned for the payment of money, the plaintiff is entitled to the security of bail, for the principal and interest due upon it; but this right is confined to the sum actually and really due by the condition; as the penalty, though strictly speaking, the legal debt, is now considered merely to be a security for the due payment of the principal, interest and costs. (z) This equitable rule owes its origin to the statute of Anne, (a) which enables the defendant to discharge and satisfy the bond, by bringing into court the principal and interest then due. Where a bond is conditioned for the payment of an annuity or money by instalments, the exercise of the right to hold to bail should be limited to the arrears actually due; but it is conceived, that where the bond, though conditioned for the payment of money by instalments, is expressly agreed that if default be made in any one payment, the bond is to be put in force for the whole principal and interest then remaining due, that in such a case the right to the security of bail need not be confined to the particular instalment over due, but may be obtained for the whole principal and interest. (b)

On bonds  
for the per-  
formance of  
covenants.

Bail in an action of debt upon a bond to perform covenants, can only be required for the amount of the damages actually sustained by the breach, and if the defendant be holden to bail for the penalty, he will be discharged on

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(z) *Stinton v. Hughes*, 6 T. R. 13. *Hatfield v. Linguard*, 6 T. R. 271. *Wilkey v. Thornton*, 2 East 409.

(a) 4 Anne, c. 16. s. 13.

(b) *Tighe v. Crafter*, 2 Taunt. 387. *Van Sandau v.* ——— one &c. 1 B. & A. 214.



entering an appearance or filing common bail. (c) In cases of this description, it should be made obvious and manifest to the court, that a covenant had been entered into; that a bond had been given for its due performance; that a breach had been committed, and that the damage sustained in consequence of such non-performance, amounted to a specific sum. A mere general statement, that the defendant covenanted to pay the balance of an account, but had failed in its performance, is insufficient. (d)

1st. In Form  
ex Contractu.

The right to an indemnity can only be co-extensive with the liability incurred, and the loss resulting from that liability; therefore in debt upon a bond conditioned to indemnify, the defendant ought not to be holden to bail for the penalty, but only for the amount of the damage actually sustained. (e)

On bonds to  
indemnify.

In all cases, where the penalty is in the nature of liquidated damages, as where a bond is conditioned for the performance of a promise of marriage, (f) and in other similar instances, where the penalty constitutes the actual debt, the transaction itself repelling any other medium of collecting the nature, extent, and estimation of the injury sustained, the party may be held to bail. It is an evil guarded against by a penalty; an infraction of the condition creates a positive and specific claim; therefore such stipulations form an exception to the above rules.

On bond  
where the  
penalty is  
the real  
debt.

The plaintiff in an action on a *bottomry* or *respondentia* bond, is entitled to bail, subject to the restrictions applicable to bail, on bonds in general. (g)

On bottom-  
ry bonds.

(c) *Boothsby v. Buller*, Sid. 63. *Anon.*, 1 Salk. 100. *Hatfeild v. Linguard*, 6 T. R. 217. *Edwards v. Williams*, 5 Taunt. 247. *Imlay v. Ellefsen*, 2 East 453. and see *Biddolph v. Temple*, 1 Lev. 260. Noy 88. 2 Roll. Rep. 53.

(d) *Whitfield v. Whitfield*, Barnes 109. See *Stinton v. Hughes*, 6 T. R. 13. *Hatfeild v. Linguard*, 6 T. R. 217. et supra.

(e) *Whitfield v. Whitfield*, Barnes 109. *Kirk v. Strickland*, 2 Doug. 448.

(f) *Kirk v. Strickland*, 2 Doug. 448. 449. *Kettelby v. Woodcock*, Barnes 86.

(g) *Deflowr v. Tutt*, Ca. Prac. C. P. 34. *Lear v. Heath*, 5 Taunt. 201. 1 Marsh. 19. s. c.

1st. In Form  
ex Contractu.

On bail  
bond.

A person who has become bail for another, cannot himself be holden to bail. The practice in this respect is uniform in all the courts; that the sheriff or his assignee shall not hold to bail either the defendant, or his bail, in an action on the bail bond. (*h*) The usual compulsory process to obtain payment is here unnecessary. For though in the ordinary transactions between man and man, the creditor cannot always know the solvency of the party, whom he is to trust, that reason ceases to operate, when applied to bail: the sheriff has a discretionary power to accept or reject such bail, as may be tendered; his duty is to have solvent persons. If he does not avail himself of this right, the evil consequences accrue to himself. (*i*) No inconvenience can result to the plaintiff in the action, as it is optional, whether he will take an assignment of the bail-bond or not. But bail in the original action, after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment. (*k*) This case is distinguishable from the general principle, that bail shall not be holden to *bail*; that rule is established on the ground that the arrest is for the *same cause of action*; but after judgment recovered against the bail a new claim is created; it includes a new cause of action, namely, the costs of the former suit.

On recogni-  
zance of  
bail.

On the same ground, in an action of debt upon a recognizance of bail, the plaintiff cannot obtain such security, for their sufficiency must have been proved or admitted, prior to their being allowed. Indeed if such a practice was tolerated, there might be bail *in infinitum*.

(*h*) *Mellish v. Petherick*, 8 T. R. 450. *Brander v. Robson*, 6 T. R. 336. *Prendergast v. Davis*, 8 T. R. 85.

(*i*) *Etherick v. Cowper*, 1 Salk. 99. 1 Ld. Raym. 425. s. c. and see 10 Co. 99, 100. *Rex v. Daws*, 2 Salk. 608.

(*k*) *Prendergast v. Davis*, 8 T. R. 85. *Butt v. Moore*, cited Tidd. 194.

The preceding rules apply also to replevin bonds. In the case of the Duke of Ormond *v.* Brierly, (l) the Court observed, that in an action upon a replevin bond, common bail must be filed.

1st. In Form  
ex contractu.  
On replevin  
bonds.

Where a cause, in which the defendant has been holden to bail is referred to arbitration, and the arbitrators award to the plaintiff a sum exceeding fifteen pounds, the defendant may be holden to bail, notwithstanding the apparent objection that the award is for the same cause of action as constituted the subject matter of the former suit. (m). Such an action not being vexatious, there is no analogy between it and an action upon a judgment. The first action was put an end to by the reference; a new cause of action arose by the arbitration, distinct in its nature, and in its ulterior proceedings, unconnected with the prior suit.

On awards.

The right to have the security of bail, in an action of debt on a judgment, depends, *first*, on the amount of the debt recovered, *secondly*, whether the party has or has not been holden to bail in the original action.

On judgments.

In consequence of several decisions in the courts of King's Bench (n) and Common Pleas, (o) that a defendant might be arrested and held to special bail, in an action on a judgment for ten pounds, for damages and costs, although the original debt alone was under that amount, the statute 43 G. 3. c. 46. s. 1. was passed, which enacts, that "no person shall be arrested or held to special bail upon any process issuing out of any court in England or Ireland, for a cause of action not originally amounting to the sum

1st. Of the  
amount of  
the debt re-  
covered.

(l) 1 Salk. 99. see Carth. 519.

(m) Collins *v.* Powell, 2 T. R. 756:

(n) Lewis *v.* Pottle, 4 T. R. 570. (o) Nightingale *v.* Nightingale, 2 Bl. Rep. 1274. Bilson *v.* Smith, Pr. Reg. C.P. 59. Nichols *v.* Wilder, Barnes, 432. Pr. Reg. C. P. 60. s. c.

1st. In Form  
ex contractu.

for which such person is, by the laws now in being, liable to be arrested and held to bail, over and above, and exclusive of any costs, charges, and expenses, that may have been incurred, recovered, or become chargeable, in or about the suing for or recovering the same or any part thereof." This act was continued by the 57 G. 3. c. 101. which enacts, "that no person shall be held to special bail upon any process issuing out of any court, where the cause of action shall not have originally amounted to the sum of fifteen pounds or upwards, over and above and exclusive of any such costs, &c., except where the cause of such action shall arise, or be maintainable upon, or by virtue of any bill or bills of exchange, promissory note or notes, in which cases the parties liable thereupon may be held to special bail in such manner as if this act had not been made." Antecedent to the introduction of these statutes, and before the cases first referred to were determined, whenever judgment was obtained on a debt originally under ten pounds, but augmented to a larger sum by the addition of costs, (p) or the action was for general damages, which were reduced by the judgment to a sum certain above ten pounds, (q) the liability of the party to be held to bail, either upon the judgment itself or upon a subsequent promise to pay the debt and costs, in consideration of forbearance, (r) was in many cases denied by the court of King's Bench. To effectuate an uniformity in the practice, the two courts ultimately adopted the same principle, which led to the enactments above recited.

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(p) *Bush v. Bates*, 5 Burr. 2660. *Robinson v. Niccolls*, 2 Stra. 1077. *Belither v. Gibbs*, 4 Burr. 2117.

(q) *De Balfe v. Mackensie*, Barnes 73—2 Stra. 1243, s. c.

(r) *Anon. Cowp.* 128.

Whenever a judgment has been obtained for a debt amounting to fifteen pounds, over and above the costs and expenses of recovering the same, the defendant may be holden to bail if none have been given in the original action, (s) although a writ of error be pending on which bail have been put in. (t) Special bail cannot in general be required where the party has been arrested in the prior suit. This rule obtains, although the bail in the original action have subsequently absconded or become insolvent, (u) or the plaintiff has released them by declaring in a different county, or for a different cause of action from that mentioned in the writ, (x) or the defendant has surrendered in their discharge and obtained a *supersedeas*, (y) unless the action has been superseded by surprise, and not by taking merely a fair advantage of the laches of the plaintiff, according to the established practice and sanctioned rules of the court. (z)

1st. In Form.  
ex contractu.

2d. Where  
the party has  
not been  
held to bail  
in the origi-  
nal action.

Where a defendant was superseded in an action upon a judgment, and again arrested in an action upon the second judgment, the court discharged him upon common bail. (a) And if a defendant, on being arrested upon process out of the King's Bench, give a warrant of attorney to

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(s) *Kendal v. Carey*, 2 Bl. 768. *Jackson v. Duckett*, Ca. Prac. C. P. 32. s. c. more fully reported *Prac. Reg. C. P.* 54. *Glascock v. Morgan*, 1 Lev. 92. *Crutchfield v. Sewords*, Barnes 116. 2 Wils. 93. s. c. *Hesse v. Stevenson*, 1 N. R. 133. 2 Smith 39.

(t) *Weyman v. Weyman*, Barnes 71. 2 Com. 556. s. c. *Kendal v. Carey*, 2 Bl. 768.

(u) *Sayer Rep.* 160.

(x) *Crutchfield v. Sewords*, Barnes 116. 2 Wils. 93. s. c. But see *De La Cour v. Read*, 2 H. Bl. 278.

(y) *Blandford v. Foot*, Cowp. 72. *Revel v. Snowden*, Pr. Reg. C. P. 77. *Chambers v. Robinson*, 2 Stra. 782. *Hall v. Howes*, id. 1039. *Pierson v. Goodwin*, 1 B. and P. 361.

(z) *Whalley v. Martin*, Barnes 62.

(a) *Chambers v. Robinson*, 2 Stra. 782.

2d. On penal  
and reme-  
dial statutes.

confess judgment, and be afterwards holden to bail in the Court of Common Pleas in an action upon the judgment, the latter court will discharge him upon a common appearance being entered. (b) In that case, the giving a warrant of attorney to confess judgment was considered as tantamount to giving bail in the first action, and that the defendant under these circumstances, if held to bail again, would suffer precisely the same inconvenience as in the common cases to which the rule is allowed to extend. It is to be observed, that this decision is at variance with a prior case, where it was held by the Court of Common Pleas, that the circumstance of bail having been put in, in the original action in the Palace Court, did not entitle the defendant to be discharged in an action on the judgment, on entering a common appearance, as the plaintiff had obtained no bail in that court before. (c)

### 2d. *On Penal and Remedial Statutes.*

On penal  
statutes.

A defendant cannot in general be holden to bail, in actions of debt on a penal statute, (d) because the penalty is in the nature of a fine or amercement imposed on the party for the nonperformance of a duty, or the commission of a prohibited act. This exemption proceeds on the equitable principle, that every man is presumed innocent until his guilt is established before a competent tribunal. Whilst his culpability remains in doubt, he should not be subjected to any inconvenience.

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(b) *Salkeld v. Lands*, 2 B. and P. 416.

(c) *Davies v. Leckie*, Barnes 94.

(d) *Yelv.* 53. 2 *Brownl.* 293. *Whittingham v. Coghlan*, Barnes 80. *Presgrave v. ———* 1 *Comyn's Rep.* 75. 1 *Com. Dig.* 481. 1 *R. P. K. B.* 118; *Gilb. Hist. C. P.* 37. 1 *Crompt. Pr.* 29, 1 *Bac. Ab.* 210.

To this rule there is an exception arising out of the express terms of particular statutes, which distinctly authorize the holding of the party to special bail, as in actions on the stat. 26 G. 2. c. 21. for having concealed wrought silks in his possession, (e) or on the stat. 46 G. 3. c. 148. for insuring in the lottery, or printing illegal schemes in it. (f)

3d. In Form  
ex delicto.

In actions on *remedial* statutes the defendant may be holden to bail, as the penalties are introduced to effectuate a double purpose, to remunerate the injured party, and to punish the aggressor. They merely superadd a new remedy for a pre-existing right. The maxim, that the innocence of the party accused shall be presumed till his culpability be established, is here inapplicable, because an injury has been committed beyond the mere infringement of a statutory regulation. (g) Hence special bail may be obtained, on the stat. 9 Anne, c. 14., by the loser at play against the winner, (h) or on the stat. 4 G. 2. c. 28. for double value incurred by a tenant holding over after notice. (i)

On remedial  
statutes.

### 3d. In Form ex Delicto.

For tortious injuries, and where the action must necessarily be in form *ex delicto* for the recovery of damages, the party cannot be holden to bail, under any circumstances however aggravated, without a judge's order being first obtained.

General  
rule.

(e) *Rex v. Rebord*, 3 Burr. 1569.

(f) *Pritchett v. Cross*, 2 H. Bl. 17. *Rex v. Decker*, 3 Anstr. 862. *Davis v. Mazzinghi*, 1 T. R. 705. *Holland v. Bothmar*, 4 T. R. 228. *King v. Cole*, 6 T. R. 640. *Rex v. Horne*, 4 T. R. 349. *Goodwin v. Parry*, 4 T. R. 577. See this statute referred to by 1 & 2 G. 4. c. 120. s. 57.

(g) The distinction between penal and remedial statutes is said to be this,—The statute is *remedial* where the action is brought by the party injured, but *penal* where brought by a common informer, 2 Bl. Rep. 1227.

(h) *Turner v. Warren*, 2 Stra. 1079. Andr. 70. *Carrill v. Cockran*, 12 Mod. 295. Holt. 85. s. c. (i) *Wheeler v. Copeland*, 5 T. R. 364.

3d. In Form  
ex delicto.

For injuries  
to the per-  
son.

In actions for *personal wrongs*, in which it is obvious the damages will exceed the sum of fifteen pounds, the court on motion, or a judge at chambers, will on an affidavit, (k) containing a clear representation and positive statement of the injury, order special bail. Thus for an *outrageous battery* or mayhem, special bail has been ordered; (l) so in an action for criminal conversation; (m) but where a defendant was holden to bail in an action for a malicious prosecution, when the defendant had been acquitted upon a defect in the indictment and not upon the merits, the court discharged an order granted for special bail, and said, it was in their discretion to order bail, and that it should only be done when the merits of the indictment had been investigated at the trial. (n)

In *scandalum magnatum* the court on motion have ordered bail, (o) and it would seem, that where special damage is ascribed to slanderous words, that such an order may be obtained. (p)

For injuries  
to personal  
property.

Antecedent (q) to a rule made by all the courts in 48 G. 3. (r) the defendant might have been holden to bail in *trover* or *detinue* without any special application to the court, but by that rule no person can be held to special bail in an action of *trover* or *detinue*, without an order being made for that purpose by the Lord Chief Justice or one

(k) *Imlay v. Ellefsen*, 2 East 458. *Davies v. Chippendale*, 2 B. and P. 282. 2 Com. Dig. 31. 32.

(l) Anon. Sid. 276: *Roberts v. Slingsby*, id. 307.

(m) *Hadderweek v. Catmur*, Barnes 61. Prac. Reg. C.P. 63. s. c. *Dyott v. Dunn*, 2 Chit. Rep. 72.

(n) *Russel v. Gately*, Prac. Reg. C. P. 66. s. c. Ca. Prac. C. P. 148.

(o) *The Earl of Stamford v. Gordal*, Raym. 74. *The Duke of Schomberg v. Murrey*, 12 Mod. 420. s. c. Holt. 640.

(p) Anon. 1 Lev. 39.

(q) *Bangley v. Titcombe*, 6 Mod. 14. *Catlin v. Catlin*, 2 Stra. 1192. 1 Wils. 23. s. c. *Le Writ v. Tolcher*, Barnes 79.

(r) R. H. 48 Geo. 3. K. B. 9 East 325. in C. P. 1 Taunt. 209. in Excheq. Man. Ex. App. 225. 8 Price Excheq. 507.



of the judges. Although the above rule is confined in terms to the actions of *trover* or *detinue*, it is clear that the same principle which dictated the introduction of it, would equally apply to the action of *trespass de bonis asportatis*. 3d. In Form  
ex delicto.

There does not appear to be any case, where bail has been ordered for injuries to *real property*; indeed, from the nature of this species of wrong, it would be almost impracticable to suggest, with any degree of precision, the extent of the damage sustained by the aggression. It is not improbable that the court, under aggravated circumstances, of extensive waste or other spoliation, would make an order for special bail, particularly if it were suggested that the offender was about to absent himself from the kingdom. (s) For injuries  
to real prop-  
erty.

By the stat. 1 Geo. 4. c. 87. tenants holding over after the determination of their tenancy, by notice or otherwise, are now required to find bail for their appearance to the action (if ordered by the court); to enter into a rule to give judgment of the term preceding the trial; and to enter into recognizances, with sureties, to pay the costs and damages recovered by the plaintiff. In eject-  
ment.

The action for *mesne profits* is bailable or not, at the discretion of the court, and when an order for bail is made, the recognizance is usually taken in two years' value of the premises, but this is likewise discretionary. (t) In actions  
for mesne  
profits.

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(s) 1 Sell. Prac. 36.

(t) Hunt. v. Hudson, Barnes 85. 1 Sell. Prac. 36.

## SECTION III.

ON THE EXPEDIENCY OF ADOPTING PARTICULAR FORMS OF ACTION, IN ORDER TO OBTAIN THE SECURITY OF BAIL.

Election of particular forms of action.

THE privilege of having the security of bail does not always necessarily depend upon the nature of the right sought to be maintained. The mode adopted to preserve its existence, or to enforce its fulfilment, not unfrequently regulates the power of exercising this privilege. It is, therefore, in many cases important, where several concurrent remedies present themselves for the redress of the same injury, that a judicious selection should be made. Thus we have seen in actions, in form *ex delicto*, as in case, trover, detinue, and trespass, the defendant cannot be holden to bail without a special order of the court or of a judge. Hence, in cases where it may be material to have the security of bail, the action should, if possible, be framed in *assumpsit* for money had and received, adding such other counts in the declaration as may be advisable under the circumstances of each particular case. (u) But in exercising this discretion, it is material to consider the effect it would produce on the ulterior proceedings in the cause, as by a prudent choice of a remedy the defendant may be frequently precluded from availing himself of a defence which he might otherwise establish. Thus by waiving the right to bail, and bringing an action of trover, a set-off may be avoided; as where goods have been sold by a person in contemplation of bankruptcy, by way of fraudulent preference to a creditor, the remedy by the assignees should be trover, and not *as-*

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(u) See *Govett v. Radnidge*, 3 East 70.

*sumpsit*; because in the latter form of action the defendant might avail himself of the debt due from the bankrupt as a set-off; (x) and where a person who has been a bankrupt, is sued in *assumpsit* for money had and received by him before his bankruptcy, however tortiously obtained, his certificate would be a sufficient bar, but by electing to proceed in case or trover, he would be deprived of that defence. (y)

Personal  
exemption.

## CHAPTER III.

### OF THE PERSONS WHO MAY OR MAY NOT BE HELD TO BAIL.

It may be assumed as a general principle, that all natural persons having capacity to contract, may be holden to bail, where the cause of action is such as to admit of an arrest, and the party not within any of the exemptions enumerated in the present chapter.

General  
rule.

The privilege of exemption from the ordinary liability of being holden to bail, may be considered as *personal*, *temporary*, or *local*.

### SECTION I.

#### OF PERSONAL EXEMPTION.

THE dignity of the Sovereign and the safety of the state, concur in establishing the necessity of exempting the king under any circumstances from being held to bail. (a)

Of the  
king.

The Queen Consort, or Queen Dowager, and the other

Of the  
Queen and  
Royal Fa-  
mily.

(x) *Nixon v. Jenkins*, 2 H. Bl. 135. *Smith v. Hodson*, 4 T. R. 211. *Parker v. Norton*, 6 T. R. 695. *Govett v. Radnidge*, 3 East 70. *Hunter v. Prinsep*, 10 id. 392. *Thomason v. Frere*, id. 418.

(y) *Parker v. Norton*, 6 T. R. 695. *Hamond v. Toulman*, 7 id. 618. *Forster v. Surtees*, 12 East 605.

(a) 2 Inst. 59. *Chit. Jun. Prerog.* §74.

Personal  
exemption.

Servants of  
the king.

branches of the royal family, are from their exalted station equally free from such liability. (b)

As a mark of respect to the king, and to prevent inconvenience accruing to him from the coerced absence of his domestics, none of his majesty's household, or menial servants, or officers *bona fide*, substantially and continually employed, or liable to be permanently engaged in waiting or attending on the royal person, can be holden to bail. (c) This is the prerogative of the king. An exemption from the ordinary course and operation of the laws; instituted, not for the protection of the servant, but for the convenience and dignity of the sovereign. The reason for this privilege, is thus stated by Lord Coke: "Concerning those that serve the king in his household, their continual service and attendance upon the royal person is necessary." To persons of this description, therefore, must the privilege be limited and restrained.

Where the party is actually a domestic and menial servant of the king, and the acts performed not merely colourable, as for instance, coachman in ordinary, (d) or clerk of the kitchen, (e) there can be no doubt of his privilege. In a recent case a person stating that he was invested by patent with the office of lighter of the fires and candles to the king's yeomen of the guards, was discharged on filing common bail; it being positively sworn, that he had acted in that capacity, and was every moment liable to be summoned to perform the duties of his office. (f)

(b) Co. Lit. 133. 2 Inst. 50.

(c) Rex v. Moulton, 2 Keb. 8. Starkie's case, 1 Keb. 842. Rex and Capell v. Baud, ibid. 877. Rex v. Frampton, ibid. 485. Anon. Ld. Raym. 152. Wiltshire's case, Het. 52. See 2 Inst. 631. 4 id. 24. Wood Inst. 576, and Bartlett v. Hebbes, 5 T. R. 686.

(d) King v. Foster, 2 Taunt. 167. (e) Bartlett v. Hebbes, 5 T. R. 686.

(f) Forster v. Hopkins, 2 Chit. Rep. 46. In Sard v. Forrest, the court of King's Bench thought it doubtful whether a yeoman of the guard, as such, is privileged from arrest. M. T. S. G. 4. MSS. 1 B. & C. 139. s. c. 2 D. & R. 250. s. c.

The criterion to be adopted, in order to ascertain who are entitled to the benefit of this exemption, is the nature of the duties to be fulfilled by the party claiming it; for if he be merely a nominal servant, without remuneration or emolument, and his official duty only consists in attending at the performance of state solemnities—as coronations, public funerals, &c. without being compelled to act either in the capacity of servant in ordinary in the royal household, or a continual attendant on his majesty's person,—such employments do not come within the reason assigned for this privilege. Therefore, the court refused to discharge the major of the Tower of London out of custody, on the ground, that he was arrested when returning from an attendance on the Prince Regent; because it did not appear that he had been attending by the command of his royal highness; or that it was part of the defendant's duty to be in attendance at Carlton House; but that he merely attended there, on the unauthorized supposition, that he had official business with the Prince Regent. (g) And it appears that a gentleman of the king's privy chamber is not, as such, privileged from being holden to bail. (h)

Personal  
exemption.  
—  
Servants of  
the king.

On the accession of his late majesty to the throne, a proclamation was issued, (i) “whereby,—after reciting that his majesty's predecessors had signified their pleasure that the royal servants should have and enjoy all ancient privileges,—his majesty thinking it reasonable that all his *servants in ordinary with fee should, in regard of their constant attendance upon his majesty's person, enjoy the like*

(g) *Batson v. M'Lean*, 2 Chit. Rep. 48.

(h) *Luntley v. Battine*, 2 Barn. & Ald. 234. *The King v. Moulton*, 2 Keb. 3. contra. *Tapley v. Battine*, 1 D. & R. 79.

(i) Pegge's *Curialia*, dissertation on the original nature and duty of the gentlemen of the privy chamber, p. 77., cited in *Luntley v. Battine*, 2 Barn. and Ald. 238, and 239, note.

Personal  
exemption.  
—  
Servants of  
the king.

privileges with those of his predecessors, ordered that the Lord Chamberlain and other officers therein mentioned should signify to all mayors, sheriffs, &c. of corporations and counties, that his servants should have their ancient privileges, and that thenceforward none of the *servants in ordinary with fee*, should bear any public offices, serve on juries, or inquests, watch, or ward." This proclamation does not mention the privilege from arrest, as the ancient proclamations on these occasions used to do. In a recent case—Abbott, C. J. observed, (*k*) "the form of the proclamation shews, that the privileges there enumerated are confined to his majesty's servants in *ordinary with fee*. And that though the proclamation was not applicable in all its terms to the case then before the court, it furnishes a ground for a distinction, which may be taken between servants with and without fee."

It would seem that if a servant of the king be clearly exempted by the nature of his employment, the privilege will not be affected by the circumstance of the king not residing personally at the time in the palace, in which the servant is employed, such palace being still privileged as a royal residence. (*l*) And it has been decided, that a servant of the king is privileged from arrest although he be a public trader, and the debt was contracted in the course of his trade. (*m*)

Where the privilege is clear, the court will discharge the party on motion; where it is doubtful, they will leave him to his writ of privilege. (*n*)

Servants of  
the queen.

The domestics of the queen consort, or queen dowager,

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(*k*) Luntley v. Battine, 2 Barn. & Ald. 237.

(*l*) See Miles v. Winter, 10 East 577. 1 Camp. 475. n. s. c.

(*m*) Rex. v. Foster, 2 Taunt. 167.

(*n*) Luntley v. Battine, 2 Barn. & Ald. 234. F. N. B. 281. Co. Lit. 1316. Godb. 290.

have no privilege; they are subject to the same process as the servants of private individuals.

Personal  
exemption.

At common law, and still under certain restrictions, the king possessed the prerogative of exempting his debtor from the proceedings of other creditors, until the crown debt was satisfied.

By writ of  
protection.

This extraordinary power was formerly exercised by the king granting a writ of protection to those he wished to absolve from being subject to ordinary legal process, but the inconvenience resulting from the extension of such a prerogative was soon generally felt both by the crown and the people, as it afforded encouragement to the king's debtors to postpone the payment of the debts due to the crown, in order to obtain protection from the claims of other creditors. (o) These difficulties were removed by the stat. 25 Ed. 3. st. 5. c. 19. enacting, that notwithstanding such protection, other creditors might proceed to judgment against the party with a stay of execution till the king's debt be paid, unless such creditor would undertake for the king's debt, and then he should have execution for both. (p) Since this statute, the crown can only delay the *execution*, not the *suit* of its subjects. The statute, it has been decided, applies only to cases where a writ of protection has been actually granted. (q)

The exercise of this prerogative is now discontinued, though the power of the crown to grant such protection remains entire. (r)

Where a subject is engaged in the king's service out of the realm, the king may, by his writ of protection,

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(o) Co. Lit. 1316.

(p) 3 Bl. Com. 289. See 41 Edw. 3. Fitz. Abr. Execution Pl. 38., cited in *Rex v. Cotton*, Parker 123.

(q) *Stevenson's case*, Cro. Car. 389.

(r) Co. Lit. 1316. and note 206.

Personal  
exemption.

Peers of  
England.

exempt him from all personal and real suits for the period of one year. (s)

As well to protect the sovereign from being deprived of the advice and assistance of his peers, as from respect to their dignity and supposed sufficiency of property to compel an appearance, Peers of England are privileged from being holden to bail, even when parliament is not sitting, because their counsel and co-operation is at all times due to the king; (t) nor is this exemption affected by their being sued jointly with unprivileged persons: (u) but it seems, a peer by patent, if he has never been summoned to parliament, cannot avail himself of this exemption, when sued as a commoner by his christian and surname, and not by his title of nobility. (x) Where the right to the title is admitted by the description given of the defendant in the process, the court will, on motion, discharge him out of custody. (y) In a case reported in *Ventris*, (z) a bill of Middlesex issued by an attorney, was discharged by *supersedeas* without pleading, because it appeared by the record that the defendant was a peeress, and the attorney was committed for suing out the process. Where the privilege is doubtful it is incumbent on the plaintiff to discover, whether the defendant is entitled to it or not. The mere circumstance of the defendant having occasionally neglected to

(s) Co. Lit. 130, 1. 3 Bla. Com. 289. *Barrudale v. Cutts*, 3 Lev. 332.

(t) *Countess of Rutland's case*, 6 Co. 52. *Earl of Shrewsbury's case*, 9 Co. 49. *Machalley's case*, 9 Co. 68. *Foster v. Jackson*, Hobart 61, Style 222. *Earl of Lonsdale v. Littledale*, 2 H. Bl. 272. *Couche v. Lord Arundel*, 3 East 127. *Briscoe v. the Earl of Egremont*, 3 M. & S. 88. 2 Leon 174. F.N.B. 427. *Earl of Athol v. Earl of Derby*, 2 Lev. 72. *Pitt's case*, 2 Com. Rep. 444. *Trinder v. Shirley*, 1 Doug. 45. 4 Bac. Ab. 233.

(u) *Briscoe v. the Earl of Egremont*, 3 M. & S. 88. *Hosier v. Lord Arundell*, 3 B. & P. 7.

(x) *Lord Banbury's case*, 2 Lord Raym. 1247. 2 Salk. 512. s. c.

(y) Vide *supra*, and *Couche v. Lord Arundel*, 3 East 127.

(z) *Anon. Vent.* 298.



claim the protection incident to his peerage, is not a waiver of it at the suit of another plaintiff, and will not authorize his being proceeded against by common process and holden to bail. (a)

Personal  
exemption.

It has been adjudged that where the defendant's right to the title, and his personal identity are involved in doubt, the court will not decide the question of privilege of peerage on motion; but leave the party to his remedy by plea in abatement. (b) Where nobility is gained by writ or patent, without descent, it is triable by the record; but when gained by matter in fact, as by marriage, or where descents are pleaded, it is triable by the country. (c) Although holding a peer to bail is an irregularity, the officer executing the process does not thereby become a trespasser. (d)

Peers of  
England, &c.

Peeresses are entitled to the same privilege of exemption from arrest as peers, whether they are peeresses by birth, creation, or by marriage: (e) but if a peeress of the description afterwards intermarry with a commoner, she forfeits all her privileges as well as her title of nobility. (f)

English  
peeresses.

The peers of Scotland had no privilege in this kingdom, (g) antecedent to the 1st May 1707; but, now by the 23d article of the act of union, (h) the sixteen elected peers are allowed all the privileges of the peers of the parliament of Great Britain; and all other peers and peeresses of Scotland, (i) whether such peers shall have been chosen

Scotch  
peers.

(a) *Fortnam v. Lord Rokeby*, 4 Taunt. 668.

(b) *Lord Banbury's case*, 2 Lord Raym. 1247. *Davies v. Rendlesham*, 1 B. Moore 410. (c) 22 Assize, 24. 2 Salk. 512.

(d) *Tarlton v. Fisher*, 2 Doug. 671. 677.

(e) *Countess of Rutland's case*, 6 Co. 52. Anon. 1 Vent. 298. Style 252. contra.

(f) Co. Lit. 166. *Countess of Rutland's case*, 6 Co. 53. 4 Bac. Ab. 229. *Haward v. Duke of Suffolk*, 1 Dyer 79.

(g) *Lord Sanchar's case*, 9 Co. 117. (h) 5 Ann. c. 8. art. 23.

(i) 5 Ann. c. 8. art.

**Personal exemption.**

to sit in parliament or not, (k) are to enjoy all the privileges of the peerage of England, except that of sitting and voting in parliament.

**Irish peers.**

By 39 & 40 G. 3. c. 67. art. 4. (the act of union with Ireland), Irish peeresses, and unelected as well as elected peers, have the same immunities and privileges as the peers and peeresses of Great Britain. (l)

**Servants of peers.**

Antecedent to the passing of the 10 G. 3. c. 50. the servants of peers necessarily employed about their persons and estates, could not be holden to bail. (m) In *Chester v. Upsdale*, (n) the court of King's Bench refused to discharge a person on common bail, who claimed his privilege, as a gamekeeper in the service of Lord Willoughby de Broke, on the ground that it did not appear that the defendant was necessarily employed about his lordship's estate. The court referred to the order of the House of Peers, of the 28th of June 1715, which they considered to be a declaration by the lords themselves of the extent of their own privileges; and as the defendant did not bring his case within the terms of that order, the court refused to discharge him on motion, but gave no opinion whether he was entitled to the privilege he claimed.

The 10 G. 3. c. 50. s. 1. enacts, "that after the 24th day of June 1770, any persons may at any time commence and prosecute any action or suit in a Court of Record, or Court of Equity, or Admiralty; and in all causes matrimonial and testamentary, in any court having cogniz-

(k) *Lord Mordington's case*, Forts. 165. *Holiday v. Colonel Pitt*, 2 Stra. 990.

(l) *Davies v. Lord Rendlesham*, 1 B. Moore 410.

(m) *Rivers v. Cousin*, cited in *Earl of Shaftsbury's case*, 1 Mod. 146.

(n) 1 Wils. Rep. 278. And see *Wickham v. Hobart*, 2 Stra. 1065, Ca. Temp. Hard. 348. s. c. 4 Bac. Ab. tit. Privilege.

ance of causes matrimonial and testamentary; against any peer or lord of parliament of Great Britain, or members of the House of Commons, or *against their or any of their menial or other servants*, or any other person entitled to the privilege of parliament of Great Britain: and no such action, suit, or other process, or proceedings, shall at any time be impeached, stayed, or delayed, under colour or pretence of privilege of parliament." But the second section of the act provides, "that it shall not extend to subject the persons of members of the House of Commons for the time being, to be arrested or imprisoned upon any suit or proceedings."

Personal exemption.

Servants of peers.

In consequence of this statute, the court of King's Bench, in a late case, (o) refused to grant an application to discharge a defendant on common bail, on the suggestion, that he was employed as a surveyor on the estate of a peer; and in that case, Abbott, Chief Justice, observed, that he knew of no instance since the passing of the statute 10 G. 3. c. 50., in which the privilege of exemption from arrest had been extended to the menial servants of peers, or to persons in the situation of the defendant.

According to the law and custom of parliament, members of the House of Commons from the time of their election, are privileged from being holden to bail. (p)

Members of the House of Commons.

The duration of this exemption is not confined to the actual sitting of the parliament, but to a convenient time after the prorogation or final dissolution of that assembly. The exact period to be allowed, as an interval between the happening of either of these events, and the termina-

(o) Connelly v. Smith, 1 Chit. Rep. 83.

(p) 12 & 13 W. 3. c. 3. 10 G. 3. c. 50. . Els. on Parl. 245. Cotton's Records, 704. Holiday v. Pitt, Forts. 159. Ca. Temp. Hard. 28. 37. s. c. Cunn. 16. s. c. Athol v. Derby, 2 Lev. 72. Executors of Skewys v. Chamond, 1 Dyer, 59. b. Barnes v. Ward, Sid. 29.

Personal  
exemption.

Members of  
the House  
of Com-  
mons.

tion of the privilege, has never been, by the common law, clearly limited or defined. (q) The judges, from a desire not to interfere with such immunities, have scrupulously abstained, whenever the question has been agitated, from giving a direct adjudication on the subject. Indeed, the House of Commons itself has always, in this respect, avoided deciding the limits of their privilege. The generally received opinion, and the practice adopted and acted upon, appear to be—where the house is prorogued, to allow forty days before and forty days after every session, (r) which is now in effect, a total exemption from arrest, during the existence of the parliament, to which the member was elected, as the prorogation of the house according to the present usage scarcely ever extends beyond eighty days at a time.

It is clear that the members enjoy this privilege after a dissolution, as well as after a prorogation; that is; they are exempt from arrest for a convenient time before the first meeting, and after the final dissolution of the parliament to enable them to come from and return to any part of the kingdom. (s) The period allotted for the duration of the privilege, *eundo et redeundo*, has not been distinctly defined, nor can its probable limits be suggested, or illustrated by numerous decisions. In the principal case on the subject, (t) the parliament was prorogued on the

(q) Pitt's case, 2 Com. Rep. 444.

(r) Cotton's Records, 704. Els. on Parl. 245. Athol v. Derby, 2 Lev. 72. Holiday v. Pitt, Ca. Temp. Hard. 28. 37. 2 Com. Rep. 444. s. c. Forts. 159. s. c. Jackson v. Kirton, 1 Brownl. 91. 4 Bac. Abr. 233. 1 Bla. Com. 165. Sed vide Barnes v. Ward, Sid. 29.

(s) Scobell, 88. 108. Holiday v. Pitt, Ca. Temp. Hard. 28. 37. 2 Com. Rep. 444. s. c. 2 Stra. 985. s. c. See 6 H. 8. c. 16., 34 & 35 H. 8. c. 13., and 35 H. 8. c. 11., 12 & 13 W. 3. c. 3.

(t) Holiday v. Pitt, Ca. Temp. Hard. 28. 37. s. c. 2 Stra. 985. 2 Com. Rep. 444. s. c. Cunn. 16. s. c. Forts. 159. s. c. And see Jackson v. Kirton, 1 Brownl. 91. Ra. Ent. 664. 35 Hen. 8. c. 11. Atkins, power of parliament, 38. 44.

16th of April, dissolved on the 17th, and the new writs bore *teste* on the 18th following, and the defendant was holden to bail on the 20th. Lord Hardwicke, Chief Justice, delivered it as the unanimous opinion of the judges who were present at the argument, that the defendant was entitled to the privilege of parliament *redeundo*, and that it was not necessary in that case to determine to what time it was limited; for supposing it to be only for a convenient time, the defendant was arrested within that convenient time, he having been taken within three days after the prorogation, and two days after the dissolution of the parliament: and that, consequently, his person ought to be discharged. It is conceived, that if this important question should be again agitated, that the courts would probably determine it with reference to the practice adopted in the analogous case of a prorogation, and extend it to an interval of forty days before, and subsequent to the final dissolution. Indeed, this conjecture appears to be authorized and directly sanctioned by an event related by Scobell, (u) to have occurred in 1586, when Mr. Martin, a member of the House of Commons, was arrested 20 days before the meeting of parliament. The house ordered him to be discharged, but when the question was put whether they should limit a term for the continuance of this privilege, the proposition was negatived. From this resolution it is clear, that 20 days is not too protracted an interval, and it may not be superfluous to remark, that in the principal case before alluded to, the defendant had resided for one year previous to his arrest, in the neighbourhood of London.

Personal exemption.  
Members of the House of Commons.

If a member be arrested during the period of privilege, the court will generally discharge him on motion, and

Mode of obtaining discharge.

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(u) Scobell's memorial, 108.

Personal  
exemption.

Members of  
the House  
of Com-  
mons.

Mode of ob-  
taining dis-  
charge.

will not oblige him to sue out a writ of privilege, (x) or require common bail to be filed; (y) though it seems, that it is discretionary with the court to grant the rule, or to proceed by writ of privilege, according to the circumstances of the case. (z)

It is said that the rule to shew cause why the defendant should not be discharged, will not be granted on an affidavit only; but the attendance of the clerk of the crown, or his deputy, with the sheriff's return to the writ of election, is requisite. (a)

Servants of  
members of  
the House of  
Commons.

At common law, the servants of members of the House of Commons were exempt from being holden to bail; (b) but this privilege appears to be taken away by the provisions of the act 10 G. 3. c. 50. (c)

Members of  
convocation.

The stat. 8 Hen. 6. c. 1. enacts, "That all the clergy hereafter to be called to the convocation, by the king's writ, and their servants and families, shall, for ever hereafter, fully use and enjoy such liberty or defence, in coming, tarrying, and returning, as the great men and commonalty of the realm of England called, or to be called to the king's parliament, do enjoy, and were wont to enjoy, or in time to come, ought to enjoy." (d)

Ambassa-  
dors.

To preserve inviolate the security and independence of public functionaries, sent from one state to another, all foreign jurists concur in the opinion, that neither an ambassador, nor any of his suite, can be sued for any debt or contract, in the courts of that kingdom, wherein he is

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(x) *Holiday v. Pitt*, Ca. Temp. Hard. 28. 37. s. c. 2 Com. Rep. 444. Forts. 159. 342. s. c. 2 Barn. K. B. 222. s. c. 2 Stra. 985. s. c. Cunn. 16. s. c. 12 & 13 W. 3. c. 3. (y) Vide supra. (z) 1 Wils. 278.

(a) 2 Bl. Rep. 788. *Executors of Skewys v. Chamond*, 1 Dyer. 59. b.

(b) 4 Bac. Ab. 230.

(c) Vide ante, p. 48., and 5 Hen. 4. c. 6. 11 Hen. 6. c. 11. 12 & 13 W. 3. c. 3. 2 & 3 Ann. c. 18. 11 G. 2. c. 24.

(d) Eq. Ca. Ab. 349.

sent to reside. The sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety, necessary to the proper discharge of his functions; without which, the admission of a foreign or public minister, would be nugatory. This principle of the law of nations is recognised and confirmed as part of the municipal law of England. (e) The statute 7 Anne, c. 12. s. 3. declares, "that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador or other public minister, of any foreign prince or state, authorized and received as such by her Majesty, her heirs, or successors, or the domestic or domestic servants of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be null and void, to all intents, constructions, and purposes whatsoever." But it is added "that no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath, or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this act."

Personal  
exemption.  
Ambassa-  
dors.

The legislature in thus recognising in clear and unequivocal terms, an ambassador's and his domestic's pre-existing common law privilege of exemption from arrest, appears to have had three distinct objects in view.—1st. To establish, beyond any doubt, an ambassador's right to the privilege; and to prescribe in general terms to what functionaries this exemption should extend.—2d. To confer on their servants the same immunity from

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(e) *Triquet v. Bath*, 3. Burr. 1478. 1 Bl. 471. s. c. *Heathfield v. Chilton*, 4 Burr, 2016. *Viveash v. Becker*, 3. M & S. 291.

Personal  
exemption.

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dors.

To what  
ministers it  
applies.

arrest.—3d. To point out and define the mode in which an infraction of its different provisions should be punished.

That it applies to ambassadors properly so called is evident from that description of public functionaries being clearly named and designated in the statute. So far, no difficulty can arise. It is only in descending to the different gradations in rank, that doubts have occurred as to whom the privileges should be confined, or the exemption from arrest extend. The words used in the act are, “ambassadors or other public ministers of a foreign prince or state;” therefore, in collecting whether a party falls within the privilege of exemption, it is material to ascertain the capacity in which he acts. If he be a public minister, he is protected by the statute; but where the official functions he has to fulfil, are rather the duties of a commercial agent than those of a diplomatic, or political negociator, it being no part of his office to transact business between the two states, the same rule of exemption does not apply. Thus it has been decided, that a resident merchant of London, who is appointed and acts as consul (*f*) to a foreign prince, is not exempt from arrest upon mesne process; (*g*) still less is one styled

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(*f*) “Among the modern institutions for the utility of commerce, one of the most useful is that of consuls, or persons residing in large trading cities, and especially in foreign sea-ports; with a commission, empowering them to attend to the rights and privileges of their nation, and to terminate misunderstandings and contests among its merchants. When a nation trades largely with a country, it is requisite to have there a person charged with such a commission; and as the state which allows of this commerce must naturally favour it; so, for the same reason, it is likewise to admit a consul. But there being no absolute and perfect obligation to this, the nation disposed to have a consul, must procure itself this right by the very treaty of commerce. The consul is no public minister, and cannot pretend to the privileges appertaining to such character. Yet, bearing his sovereign’s commission, and being in this quality received by the prince, in whose dominions he resides, he is in a certain degree entitled to the protection of the law of nations.” Vattel, b. 2. c. 2. s. 34.

(*g*) Buvot v. Barbut, Ca. Temp. Talb. 281. cited 3 Burr. 1481. Clarke



in his credentials agent of commerce. (h) In the principal case, *Viveash v. Becker*, (i) Lord Ellenborough, C. J. said, "I cannot help thinking that the act of parliament which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried. It appears to me, that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges. Thus a consul might appoint a vice-consul in every port, to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly, which the Crown could not grant directly. If we saw clearly that the law of nations was in favour of the privilege, it would be afforded to the defendant, and it would be our duty rather to extend than narrow it." From this judgment it is clear and evident, that the courts in England are disinclined to circumscribe the privilege of foreign functionaries to the strictest limits, but will construe the words "public ministers" in that mode of interpretation, which will most conduce to facilitate an easy and unrestricted international communication. Thus it appears an envoy, who is in the second class of foreign plenipotentiaries, would be exempt from arrest. (k) Vattel, indeed, (l) says, "In every case it would be sufficient

Personal  
exemption.

Ambassa-  
dors.

To what  
ministers it  
applies.

*v. Cretico*, 1 Taunt. 106. *Deserisay v. O'Brien*, Barnes, 375. Reported in Cas. Prac. C. P. 13. by the name of *Decerissay v. O'Brien*.

(h) *Buvôt v. Barbut*, Ca. Temp. Talb. 281. cited 3 Burr. 1481.

(i) 3 M. & S. 298.

(k) Per Lord Mansfield, in *Heathfield v. Chilton*, 4 Burr. 2017. *Cain v. Molineux*, Barnes, 374. *Evans v. Hicks*, 2 Ld. Raym. 1524. more fully reported, 2 Stra. 797. by the name of *Evans v. Higgs*.

(l) B. 2. c. 2. s. 34.

Personal  
exemption.

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To what  
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applies.

to shew, that by the law of nations a party is entitled to this privilege, without inquiring whether he is, in the strict sense of the word, a public minister." But this rule of that profound and ingenious jurist, seems incompatible with the practice of our courts; where it is necessary to shew in distinct and positive terms, the manner in which the minister is accredited; that he acts as a diplomatic agent for a foreign independent state; that he has exercised the functions annexed to his office; and that his appointment and power are in force at the time of the application for his discharge. (m)

Duration of  
the privi-  
lege.

It is said, that a plenipotentiary, notwithstanding the death of his sovereign, still continues to be the minister of the nation he represents; and as such, is entitled to enjoy all the rights and honours annexed to that character. (n) It is his duty to remain in the country to which he has been sent, until the pleasure of his new prince be known. If he be recalled or dismissed, though his functions cease, his rights and privileges do not immediately expire. He retains them till his return to his sovereign, to whom he is to make a report of his mission. (o)

But if a foreign minister continues to *reside* in the British dominions, after the cessation of his official functions, he is not exempt from being holden to bail. The period, however, allotted for his departure, is not marked out or defined by the cases on the subject, with that clearness and precision the importance of the question makes desirable. It has indeed been decided, that an interval of several months elapsing between the dismissal of a minister and his departure from this country, is too protracted a period. (p) And where a person who

(m) *Heathfield v. Chilton*, 4 Burr. 2016. *Clarke v. Cretico*, 1 Taunt. 106. *Viveash v. Becker*, 3 M. & S. 284. (n) *Vattel*, B. 4. c. 9. s. 126.

(o) *Ibid.* s. 125.

(p) *Marshall v. Critico*, 9 East, 447.

had been delegated as a minister from the *Porte*, had been dismissed several months from his employment, and another resident here appointed in his room; it was determined he was not privileged from being holden to bail, though at the time of the arrest he had not received any official notification of his dismissal, or of the appointment of his successor. (q)

Personal  
exemption.

Ambassa-  
dors.

Duration of  
the privi-  
lege.

It has been seen from the general tendency, of the stat. 7 Anne, c. 12. s. 3., and from the uniform construction it has received, that this immunity of exemption from arrest, is not confined to public ministers, but extends to the protection of their domestic servants.

Ambassa-  
dors' ser-  
vants.

As there are several important, and somewhat conflicting adjudications upon this branch of the subject, to be enumerated and discussed, it may be expedient to consider,

- 1st. *What class of servants are within this privilege ;*
- 2d. *What class of servants are not within this privilege ;*
- 3d. *At what time and in what manner advantage is to be taken of it.*

Every person really, and *bona fide* a domestic servant, in the actual employment of an accredited foreign minister, performing and fulfilling the duties of a retained and hired servant, without collusion, and not a trader within the intent of the bankrupt laws, is privileged from being holden to bail. (r) As the words in the statute 7 Anne, c. 12., "domestic and domestic servants," are only inserted as an example to illustrate the class of persons intended to be within its provisions; it follows, that to entitle a party to this exemption, it is not material that he should be a part occupier, and reside in

Servants  
within the  
exemption.

(q) Vide supra.

(r) *Triquet v. Bath*, 3 Burr. 1478. 1 Bl. 471: s. c.

Personal  
exemption.  
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Servants  
within the  
exemption.

the house belonging to the ambassador : it is sufficient if the nature of his employment requires his attendance upon the minister. (s)

On this principle, it has been determined, that a secretary to a foreign minister, boarding and lodging in a house separate and distinct from the ambassador's, is protected: (t) and this privilege has long been settled to extend to domestics of a public minister, being natives of the country where he resides, as well as to his foreign servants. (u)

The circumstance of the party having been a trader, seven years antecedent to his arrest, does not, if in other respects entitled, deprive him of his privilege: (x) nor to confirm and ratify this exemption, is registration necessary; as the provision in the statute, requiring the names of the persons privileged, to be recorded at the secretary of state's office, is for the purpose of instituting proceedings of a criminal nature, for a violation of the act, and not a condition precedent to a full enjoyment of the exemption: it is now, therefore, clearly settled, that a domestic servant is privileged from arrest, though his name be not registered. (y)

Of servants  
not within  
the exemp-  
tion.

By the law of nations, as well as by the statute of Anne, a public minister cannot protect a person who is not *bona fide* his servant. It is the law that confers the protection; and though the process of the law will not take a *bona*

(s) *Evans v. Hicks*, 2 *Ld. Raym.* 1524. s. c. more fully reported *Evans v. Higgs*, 2 *Str.* 797. *Widmore v. Alvarey*, *Fitzg.* 200. *Darling v. Atkins*, 3 *Wils.* 33. In *re Count Haslang*, *Dickins*, 274. *Toms v. Hammond*, *Barnes*, 370. *semb. contra.*

(t) *Triquet v. Bath*, 3 *Burr.* 1478. 1 *Bl.* 471. s. c. *Hopkins v. De Robeck*, 3 *T. R.* 79. *Toms v. Hammond*, *Barnes*, 370. *semb. contra.*

(u) *Triquet v. Bath*, 3 *Burr.* 1478. 1 *Bl.* 471. s. c.

(x) *Ibid.*

(y) *Heathfield v. Chilton*, 4 *Burr.* 2017. *Darling v. Atkins*, 3 *Wils.* 33. *Hopkins v. De Robeck*, 3 *T. R.* 79.

*fide* servant out of the employment of a public minister; yet, on the other hand, a public minister cannot take a person who is not *bona fide* his servant out of the custody of the law, or protect him from the payment of the debts he may have incurred: (z) Hence, a retainer for the purpose of protection from arrest, will not avail. A collusive hiring, colourable service, and nominal remuneration, confer no privilege. Thus, where a physician accepted a temporary salary of forty pounds per annum, and ostensibly abandoned his practice, but continued to live in an expensive and splendid manner, by supporting a large establishment, livery servants, and carriage; the court said, it was manifest that the defendant was not entitled to the character he had assumed, and that the appointment given him was fictitious and colourable, and therefore, not within the reasons on which the exemption was established. (a) Nor will a retainer by a public minister, *subsequent* to the arrest, entitle the party to be discharged; (b) for if he had no privilege at the time of the arrest, no retrospective exemption can be conferred on him, by being afterwards taken into the service of a foreign functionary.

Personal  
exemption.

Of servants  
not within  
the exemp-  
tion.

The party claiming the privilege must not combine two distinct characters, and fulfil two separate capacities; the one, as servant to a public minister; the other, different from, and unconnected with, such employment; for the claim to exemption from arrest, under such circumstances, has been invariably held by the courts, nugatory and unavailable. Thus, the protection of an ambassador to his English secretary, was disallowed; because it ap-

(z) *Triquet v. Bath*, 3 Burr. 1478. 1 Bl. 471. s. c. *Heathfield v. Chilton*, 4 Burr. 2016.

(a) *Lockwood v. Dr. Coysgarne*, 3 Burr. 1676.

(b) *Heathfield v. Chilton*, 4 Burr. 2017.

Personal  
exemption.

Of servants,  
not within  
the exemp-  
tion.

peared, that he was a purser of a ship of war, as well as secretary. (c) So to a person claiming the privilege; who was also a justice of the peace. (d) So to one retained to be interpreter to an ambassador, and transact his business in London and Westminster, for an annual stipend; it not being distinctly shewn, that he acted as a domestic servant; or that, the whole of his avocations were confined to duties arising out of the employment he received from the ambassador. (e) On the same principle it has been determined, that a chorister, in the chapel of an ambassador, residing in a house separate from the ambassador's, but who lets part of his house to lodgers, and is also engaged as prompter in the opera house, and as a teacher of languages, is not within the exemption; (f) and that a land waiter at the custom house in London, acting and officiating there as such, cannot be esteemed a domestic servant; notwithstanding a substantive hiring, and occasional service, in the character of messenger to a public minister, was distinctly alleged and proved. (g) It has been suggested, that a certificate from a public minister, describing the defendant as a *menial servant only*, is not within the act; and the Court of Common Pleas is reported to have said, that the word *menial* is not recognised or explained by our law. Domestic or domestic servants, is the language of the act; and it should appear that the defendant was such. A menial servant may be employed out of the house or household affairs; a domestic in or about the house only. (h) But this appears rather

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(c) *Darling v. Atkins*, 3 Wils. 33.

(d) *Toms v. Hammond*, Barnes, 370.

(e) 1 Wils. 78.

(f) *Novello v. Toogood*, Easter Term, 4 Geo. 4. MSS.

(g) *Masters v. Mauby*, 1 Burr. 401.

(h) *Toms v. Hammond*, Barnes, 370.

a casuistical than a well founded distinction, and inconsistent with the uniform practice; as it implies, that the servant must reside in the house of his employer, which, it has been shewn, is unnecessary; and that his duties must be confined to those of a strictly domestic description. It has been urged, that the privilege does not extend to a common messenger, who is paid for each journey, and who does not receive an annual and regular stipend; (i) but in the case alluded to, the party was not deprived of the privilege, on account of the nature of his employment, but because he was proved to be a person in trade. (k)

Personal  
exemption.

Of servants  
not within  
the exemp-  
tion.

The statute, it has been shewn, excludes in express words from the privilege of exemption, servants to ambassadors who are traders, or objects of the bankrupt laws. (l) Hence, a person describing himself merchant, cannot be accounted a domestic; (m) and where it appeared that the defendant was a trader, and that he resided at his own house, and that the envoy, under whom he claimed protection, was abroad at the time of the arrest; the court, without hesitation, discharged a rule, obtained to shew cause why he should not be allowed the privilege: (n) but the mere circumstance of the party having been in trade seven years prior to the exemption being claimed, does not incapacitate. (o)

As all process against the persons of domestic servants of public ministers, is declared to be void; the court,

At what  
time, and in  
what man-  
ner, advan-  
tage is to be  
taken of the  
privilege.

(i) *Deserisay v. O'Brien*, Barnes, 375. s. c. by the name of *Decerissay v. O'Brien*, Cas. Prac. C. P. 134.

(k) *Ibid.*

(l) See, ante.

(m) *Fontainier v. Heyl*, 3 Burr. 1731. *Martin v. Sharopin*, Ca. Prac. C. P. 65. *Deserisay v. O'Brien*, Barnes, 373. s. c. by the name of *Decerissay v. O'Brien*, Cas. Prac. C. P. 134.

(n) *Cain v. Molineux*, Barnes, 374.

(o) *Triquet v. Bath*, 3 Burr. 1478. 1 Bl. 471. s. c.

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exemption.

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time, and in  
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ner, advan-  
tage is to be  
taken of the  
privilege.

from whence it issued, should, where they have been arrested, be moved, that they be discharged out of custody: or that the bail-bond, which has been given, may be delivered up to be cancelled. In order to prevent any objection being taken, on the ground of unnecessary delay, this application should be made, in as early a stage of the proceedings, as the situation of the parties will admit. It is a general principle, applicable, it would seem, to this, as to any other case, that where there has been any irregularity, if the party overlook it, and take subsequent steps in the cause, he shall not afterwards be allowed to revert back to the irregularity, and object to it. (p)

A defendant, in order to substantiate his claim to privilege, as a domestic to a public minister, ought to shew by affidavit, in clear and distinct terms, the particular office with which he is invested. (q) That he was in possession of the appointment at the time of the arrest; (r) and that he continues to fulfil the duties attached to his situation. (s) A mere general statement, that he is an officiating servant, as saying, that he is retained as *valet de chambre*, without further description, is too loose and indefinite. (t) It is not, however, required, that every particular act of service should be specified. It is sufficient if there be an actual *bona fide* engagement satisfac-

(p) Vide post, Cap. 6.

(q) *Holmes v. Gordon*, Ca. Temp. Hard. 3. See *Widmore v. Alvarey*, Fitzg. 200. *Evans v. Higgs*, 2 Stra. 797. 2 Ld. Raym. 1524. s. c. by the name of *Evans v. Hicks*. *Fontainier v. Heyl*, 3 Burr. 1731. *Toms v. Hammond*, Barnes, 370.

(r) *Heathfield v. Chilton*, 4 Burr. 2017.

(s) *Triquet v. Bath*, 3 Burr. 1478. *Fontainier v. Heyl*, 3 Burr. 1731. See 1 Wils. 2078. 1 Bl. 48. 1 Barnard, 79. 80, 401.

(t) *Crosse v. Talbot*, 8. Mod. 288. A supplemental affidavit, to explain the nature of the service, is not admissible. *Heathfield v. Chilton*, 4 Burr. 2017.



torily established by affidavit ; and the courts will not, upon bare suspicion, suppose it to be merely colourable and collusive. (u) The language of the statute suggests the necessity of the affidavit in support of the defendant's discharge, negating his being a trader within the meaning of the bankrupt laws.

Personal exemption.

At what time, and in what manner, advantage is to be taken of the privilege.

Punishment for arresting ambassadors or their servants.

The 4th and 5th sections of the statute, point out and prescribe the manner in which an infraction of the privilege, either of ambassadors, or their servants, is to be punished ; by enacting, " That in case any person or persons, shall presume to sue forth, or prosecute any writs or process, such person and persons, and all attorneys and solicitors, prosecuting and soliciting in such case, and all officers executing any such writs, or process, being thereof convicted by the confession of the party, or by the oath of one or more credible witnesses, before the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of King's Bench, the Chief Justice of the Court of Common Pleas, for the time being, or any two of them, shall be deemed violators of the law of nations and disturbers of the public repose, and shall suffer such pains, penalties, and corporeal punishment as the Lord Chancellor, Lord Keeper, and the said Lord Chief Justice, or any two of them shall judge fit to be imposed and inflicted. Provided, that no person shall be proceeded against, as having arrested the servant of an ambassador, or public minister, by virtue of this act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriff of London and Middlesex, for the time being,

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(u) Per Lord Mansfield, *Triquet v. Bath*, 3 Burr. 1481.

Personal  
exemption.

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servants.

or their undersheriffs or deputies; who shall, upon the receipt thereof, hang up the same in some public place in their office, whereto all persons may resort, and take copies thereof, without fee or reward."

Thus was conferred a great and extraordinary power, which in no other instance belongs to these officers, of punishing, as criminals, on a summary application, and without the interference of a jury, parties guilty of a violation of this act. (*x*) But as an infraction of the law of nations, would, independently of the statute, have been a misdemeanour, punishable at the discretion of the court, by fine, imprisonment, and pillory; (*y*) the act does not appear to have introduced any new regulation beyond specifying the tribunal and medium, through which the punishment shall be inflicted. As the statute does not make the offence felony; the punishment cannot of course extend to the deprivation of life.

By the express words of the act, persons infringing the privilege, cannot be proceeded against criminally, unless the names of the servants shall have been registered in the office of the secretaries of state, and transmitted to the sheriff; (*z*) but it is to be observed, that the formality of registration having been complied with, is no criterion that the party claiming this privilege, is a *bona fide* servant of the ambassador's, and the sheriff is therefore bound to execute the process against him. (*a*) In a late case, (*b*) which was an action against the sheriff, for a false return, where the

(*x*) *Viveash v. Becker*, 3 M. & S. 291.

(*y*) Per Lord Mansfield, 3 Burr. 1480.

(*z*) *Hopkins v. De Robeck*, 3 T. R. 79. *Heathfield v. Chilton*, 4 Burr. 2017.

(*a*) 1 Wils. 20.

(*b*) *Delvalle v. Plomer*, 3 Camp. 47.

principles, applicable to the rule above stated, were discussed, Lord Ellenborough said, "I think it is a fact now to be tried, whether the party really was a servant to the public minister. If she was not, the appointment and notice are mere nullities; and her goods ought to have been taken in execution, according to the exigency of the writ. The sheriffs might have known that she was not the domestic servant of any one, if she was publicly keeping a boarding house on her own account; and at any rate, this is one among many other questions, which sheriffs, in the execution of process, must determine at their own peril. In cases of real difficulty, they may call for an indemnity, and the court will enlarge the time for their making their return, till an indemnity is given. The provision, that *traders* shall not be protected by the statute, peculiarly shews the necessity of tracing the real character of the supposed domestic servant, in an action of this sort."

Personal  
exemption.

Punishment  
for arresting  
ambassadors  
and their  
servants.

Where the sheriff refuses to execute process against a party claiming the privilege, who is not *bona fide*, and without collusion, an ambassador's servant, the plaintiff has an election, either to bring an action against him for a false return, or rule him to return the writ. By either of these means, the question of the defendant's title to the privilege of exemption from arrest, will be brought directly before the court, and receive a full investigation.

Members of a Corporation Aggregate, not being liable to a *capias*, cannot be holden to bail for any thing done by them in their corporate capacity. (c) And for the same reason, Hundredors are entitled to privilege from arrest, in actions on the statutes of Hue and Cry, &c. (d)

Members of  
corporation  
aggregate.

Hundredors.

(c) Bro. Ab. corporation, pl. 43.

(d) *Steward v. Howey*, 3 Kcb. 126.

Personal  
exemption.

Officers of  
courts.

All officers of the different courts of law and equity are privileged from being holden to bail. This exemption is founded on the supposed necessity of their attendance on the courts to which they individually belong. Hence, the judges of the courts of common law, (e) the masters, (f) and known clerks of the court of Chancery, (g) the philazer of the Common Pleas, (h) the prothonotary and his clerk, (i) the marshal of the King's Bench, the warden of the Fleet, (k) the clerk of the pells in the Exchequer, (l) the cursitor's clerk, (m) the auditor in the Exchequer, the commissioners of the Treasury, the receiver-general of the Revenues, and the clerk of the Remembrancer, are respectively privileged from arrest. (n) But judges' clerks, and the menial servants of other officers, are not exempted from the ordinary liability to be holden to bail; (o) and serjeants at law and barristers are not, as such, in general, privileged from being arrested on process issuing from the superior courts, though they cannot be holden to bail for a writ from an inferior one, (p) or while on the circuit. (q)

Attorneys.

Certificated attorneys, being officers of the court, are, whilst actually practising and fulfilling the duties of their profession, exempt from being holden to bail. The foundation of this privilege from arrest, is the supposed necessity

(e) *Earl de Leister v. Mandy*, 2 Sid. 31. *Crompt. Juris. of C.* 11.

(f) *Crompt. Juris. of C.* 486. *Skin.* 521.

(g) *Order of Chan.* 22d Dec. 5 Car. 1629. *Prac. Reg. in Chan.* 284. *Fawcner v. Annis*, 3 Keb. 352. 1 Vent. 264. s. c. See *Tho. Ent.* 3. *Bro. v. M.* 498. 2 Wils. 220. (h) *Brown's case*, 2 Salk. 544.

(i) *Payne v. Fry*, 1 Str. 546. *Baker v. Swindon*, 1 Ld. Raym. 399. *Swain v. Girdler, Barnes*, 371. *Prac. Reg. C. P.* 380. s. c.

(k) *Anon. Vent.* 65. (l) *Comb.* 482. (m) *Str.* 521.

(n) See *Foster v. Barrington*, 2 Sid. 164. *Lampen v. Deering*, 2 Show. 299. *Staunf.* 164. *Order of the House of Commons*, 27th Nov. 1699. 2 & 3 Ann. c. 18. s. 1. 4 Bac. Ab. 223.

(o) *Swain v. Girdler*, *Prac. Reg. C. P.* 380.

(p) *Memorandum*, *Cro. Car.* 84, 85. *Barnes*, 371. s. c.

(q) *Meekins v. Smith*, 1 H. Bl. 636.

of an attorney being always present in court. Issuing process against his person, merely to bring him there, would be therefore nugatory, as it would be only doing that, which in contemplation of law, is already accomplished. (r) This rule is considered so inviolable, that a suggestion that the attorney is about to leave the kingdom, will not prejudice his claim to the full benefit and enjoyment of this immunity. (t)

Personal exemption.,  
Attorneys.

It may not be unnecessary to observe, that notwithstanding both parties are attorneys of the same, or different courts, the plaintiff cannot hold the defendant to bail. (u) And it has been decided, that although an attorney of the King's Bench may sue an attorney of the Common Pleas, by attachment of privilege; the latter is still entitled to his exemption from arrest. (x)

To what actions the privilege extends.

The privilege extends to *qui tam*, as well as other personal actions. (y) But where the proceedings are wholly at the suit of the king, the exemption will not be recognized in opposition to the royal prerogative: (z) such a case is materially different from a *qui tam* action; the latter is only *nominally* at the suit of the king, but really and substantially at that of the informer. (a)

An attorney by becoming a party to a bill of exchange,

(r) 4 Bac. Ab. 223. Pope v. Redfearne, 4 Burr. 2028. Mayor of Norwich v. Berry, 4 Burr. 2116.

(t) Redman's case, 1 Mod. 10. s. c. by the name of Rod v. Rod, 2 Keb. 555.

(u) Thomson v. Rash, Barnes, 44. Unwyn v. Robinson, ib. 53. Nichols v. Earle, 8 T. R. 395.

(x) Beck v. Lewin, T. 56 Geo. 3. K. B., cited 1 Tidd, 76. Barber v. Palmer, 6 T. R. 524.

(y) Britten v. Teasdale, Barnes, 48. Baker v. Duncalfe, 3 Lev. 398. Kirkham v. Wheely, 3 Salk. 282. 1 Salk. 30. s. c. 12 Mod. 74. s. c. Comb. 319. Lutw. 196. Cowp. 367.

(z) 2 Rol. Ab. 274. 4 Leon. 81. Lit. Rep. 97. Kirkham v. Wheeler, Comb. 319. Kirkham v. Whaley, 1 Ld. Raym. 27.

(a) Vide notes (y) and (z), supra.

Personal  
exemption.

Attorneys.

or promissory note, does not, in the contemplation of the law, take upon himself the character of a merchant: his privilege, therefore, in such cases, attaches as in other personal suits. (b)

Where sued  
in *autre*  
*droit*.

As the exemption of attorneys from being holden to bail is an individual privilege, it is necessarily confined to cases where the attorney is sued in his own right, and does not apply to instances where he acts in the representative character of executor or administrator. (c)

When sued  
jointly.

Upon the same principle it has been settled as an established rule of law, that an attorney is not entitled to be exempt from arrest, when sued with an unprivileged codefendant, (d) as where he is sued with his wife for a debt due before the marriage; (e) although it has been determined, that where an attorney is sued as a codefendant with a member of parliament, he is at liberty to avail himself of the usual exemption. (f)

An opinion appears, at one time, to have prevailed, that to deprive an attorney of his right to exemption, when sued as a codefendant, the nature of the action must have been necessarily joint; but this distinction has since been decided to be untenable, as it is not incumbent on the plaintiff to bring separate actions, merely to avoid an encroachment on this privilege. (g)

Where the  
party be-  
comes an at-  
torney after  
the com-  
mencement  
of the suit.

A defendant by becoming an attorney after the commencement of the action, is not entitled to be discharged

(b) *Comerford v. Price*, 1 Doug. 312. *Atkins v. ———*, 2 Chit. Rep. 63. s. p., ruled by Dampier, J. 6 May, Easter T. 1815, cited in Chit. on Bills, 6th ed. 14.

(c) *Newton v. Rowland*, 1 Ld. Raym. 533. 1 Salk. 2. s. c. 12 Mod. 316. s. c. *Lawrence v. Martin*, 1 Salk. 7, 8. Holt. 46. s. c. Anon. 2 Sid. 157. Hob. 177.

(d) *Branthwait v. Blacherby*, 2 Salk. Rep. 544. s. c. 12 Mod. 163.

(e) *Powle's case*, 3 Dy. 377. a. *Robarts v. Mason*, 1 Taunt. 254.

(f) *Ramsbottom v. Harcourt*, 4 M. & S. 585.

(g) *Pratt v. Salt*, Hil. 8 G. 2. in K. B., cited 4 Bac. Ab. 223.

out of custody. (h) Reason, justice, and convenience, require that the being admitted an attorney, and taking out a certificate, should have no retrospective operation: and that the regular proceedings of the plaintiff ought not to be vacated by a voluntary act of the defendant. As where an attorney (i) had lost his privilege, by seceding from practice for several years, but had afterwards recommenced business, it was determined that he could not insist upon the privilege to the prejudice of a party who had sued out a writ against him before, but did not execute it until after he had resumed his professional pursuits.

Personal exemption.  
Attorneys.  
Where the party becomes an attorney after the commencement of the suit.

But to divest an attorney of the privilege from arrest, he must have retired from practice, and omitted to take out his certificate for the space of one year. (k)

The mere circumstance of continuing to practice without the concomitant qualification of having taken out a certificate within the year, is of no avail. (l) It was urged, in *Skirrow v. Tagg*, (m) that the effect of the defendant's neglect to obtain his certificate, was not to suspend his functions as an attorney during the interval, but only to make him liable to a penalty. The statute 37 G. 3. c. 90. s. 31. was referred to, which enacts, "That every person admitted, sworn, and enrolled, as an attorney, who shall neglect to obtain his certificate thereof, *for the space of one whole year*, shall from thenceforth be incapable of practising by virtue of such admission, entry, and enrolment, and the same shall from thence-

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(h) *Smith v. Bower*, 3 T. R. 665.

(i) *Mayor of Norwich v. Berry*, 4 Burr. 2110. *Brooke v. Bryant*, 7 T. R. 25.

(k) Rule of court, M. T. 1654. *Dyson v. Birch*, 1 B. & P. 4. and cases cited Tidd, 75. 2 Wils. 232. *Mayor of Norwich v. Berry*, 4 Burr. 2113. *Skirrow v. Tagg*, 5 M. & S. 281.

(l) *Skirrow v. Tagg*, 5 M. & S. 281. (m) 5 M. & S. 281.

Personal  
exemption.

Attorneys.

Mode of  
obtaining  
discharge.

forth be null and void." The words of this act in positive terms create the incapacity, and prescribe the time:—"From thenceforth"—that is, if he neglect for the space of one whole year.

Where an attorney entitled to the privilege is arrested, whether he be an attorney of the court; from whence the process issued; or not; he will immediately, upon motion, be ordered to be discharged upon filing common bail, or entering a common appearance. (n) The practice formerly, appears to have been, to order an attorney, sued by process, issuing out of a *different* court from that in which he had been admitted to put in bail, to sue out his writ of privilege, and plead it in abatement; (o) but this dilatory course of proceeding is no longer necessary. For in a late case, where an attorney of the Court of Common Pleas had been arrested on an attachment of privilege, at the suit of an attorney of the Court of King's Bench, the former court ordered the bail-bond to be delivered up to be cancelled, on his entering a common appearance; (p) and the Court of King's Bench have also stayed the proceedings, even after the plaintiff had signed judgment for want of a plea, in an action brought against an attorney of the Court of Common Pleas, who gave notice of his privilege, but neglected to plead it; (q) though from a subsequent decision, it may be collected that the application, on behalf of an attorney, to be discharged out of custody,

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(n) Redman's case, 1 Mod. 10. 2 Keb. 55. s. c. Brown's case, 2 Salk. 544. Wheeler's case, 1 Wils. 298. Nichols v. Earle, 8 T.R. 395. Gwynne v. Toldervy, H. 54 G. 3. K. B. Beck v. Lewin, T. 56 G. 3. K. B., cited Tidd, 219.

(o) Sney v. Humphreys, 1 Wils. 306. The Mayor of Basingstoke v. Bonner, 2 Stra. 864. 2 Lord Raym. 1567. s. c. Barnard, K. B. 300. s. c.

(p) Beck v. Lewin, T. 56. G. 3. K. B., cited 1 Tidd, 219.

(q) Gwynne v. Toldervy, H. 54. G. 3. K. B., cited 1 Tidd, 219. sed vide 2 Bl. 1088. Ibid. 231. Unwyn v. Robinson, Barnes, 53 Carth. 377. Jones v. Bodéonor, 1 Lord Raym. 135. 1 Salk. 1. s. c. 5 Mod. 310. s. c.



should be made at an early stage of the proceedings, and before putting in bail above: hence, where an attorney took out his certificate on the 25th of November, was arrested in the early part of January, and did not apply to the court, to avail himself of his privilege, until the 3d of February; the application was decided to be clearly out of time, as it was not made before bail above had been put in, nor until an interval of a month had elapsed since the arrest; and that these concurrent circumstances were a waiver of the irregularity. (r) It is observable, that in this case, it was distinctly sworn that the plaintiff had not, at the period of the arrest, the slightest reason to believe that the defendant was an attorney.

Personal  
exemption.

Attorneys.

Mode of  
obtaining  
discharge.

The application for a rule to shew cause why the defendant, a practising attorney, and as such, privileged from arrest, should not be discharged out of custody, or why the bail-bond should not be delivered up to be cancelled, and why proceedings should not be stayed; must, in general, be supported by an affidavit, stating that the defendant is an attorney of the court, that he has practised within a year previous to the arrest, and that he has taken out a certificate within that period. (s)

Although the sheriff may be apprized of the defendant being an attorney, and of his consequent exemption from arrest, he is not obliged to discharge him even upon production of his writ of privilege; and this rule obtains, whether the process upon which he was holden to bail issued from the the court in which he was admitted, or a different *superior* court. (t) But where the arrest is made

(r) *Bernard v. Winnington*, 1 Chit. Rep. 188.

(s) *Dyson v. Birch*, 1 B. & P. 4. *Bernard v. Winnington*, 1 Chit. Rep. 188. *Brooke v. Bryant*, 7 T. R. 25.

(t) *Crossley v. Shaw*, 2 Bl. 1085. *Jones v. Bodeenor*, 1 Salk. 1. s. c. 5 Mod. 310. s. c. 1 Lord Raym. 135. And see *Forster v. Cale*, 1 Stra. 76. *Comerford v. Price*, Doug. 314. 671. *Sherwood v. Benson*, 4 Taunt. 631.

Personal  
exemption.

Attorneys.  
Mode of  
obtaining  
discharge.

Costs of  
obtaining  
discharge.

Executors  
and admini-  
strators.

under process issuing out of an *inferior* jurisdiction, the writ of privilege should be allowed *instante*. (u)

When a writ of privilege is necessary, a certificate must be obtained from the master's clerk, certifying that the defendant is an attorney of the court. (x)

As the defendant would not be entitled to costs, if he pursued the ordinary mode of taking advantage of the irregularity, by pleading his privilege in abatement; it is the uniform and inflexible practice of all the courts, where an attorney moves to be discharged on filing common bail, or entering a common appearance, to stay the proceedings without costs. (y)

The responsibility incident to the office of executor or administrator, only creates a liability coextensive with the amount of the assets in their possession, so that they cannot in general be holden to bail. (z) But an executor or administrator, who has contracted personally in writing to pay a debt of the testator or intestate, may be arrested on the written promise; (a) for that is a cause of action not necessarily incidental to his representative character, to which he has voluntarily subjected himself. And where an executor or administrator has been guilty of wasting the property of the deceased, he may be holden to bail in an action of debt upon the judgment suggesting a *devas-*

(u) *Rawlins v. Parry*, Cases Prac. C. P. 2. *Crossley v. Shaw*, 2 Bl. 1085. *Scawen v. Garrett*, 2 Salk. 545.

(x) As to the mode of proceeding, see 1 Archbold, Prac. K. B. 41, 42.

(y) *Thompson v. Rush*, Barnes 44. *Unwyn v. Robinson*, id. 53. *Crossley v. Shaw*, 2 Bl. 1085. *Barber v. Palmer*, 6 T. R. 524. *Nichol v. Earle*, 8 T. R. 395.

(z) *Goldsmith v. Platt*, Cro. Jac. 350. *Sir Henry Mildmay's case*, Cro. Car. 59. 2 Bac. Ab. 447. And see Yelv. 53., Litt. Rep. 2., Brownl. 293., 3 Buls. 316. Anon. Summer Assizes for Bristol, before Mr. Justice Burrough. MSS.

(a) *Mackenzie v. Mackenzie*, 1 T. R. 716.

*tavit*; (b) for he has, by that conduct, rendered his own effects liable for the debt, and may be sued in the *debet* as well as *detinet*. But it is said, that in such a case, a judge's order to hold him to bail, must be obtained before he can be arrested, and the fact of the *devastavit* having been committed, must be clearly established by a positive and explicit affidavit, or proved by the sheriff's return to the writ of execution. (c) The judge to whom the application for an order to hold an executor or administrator to bail, under such circumstances, must be fully satisfied, by the production of these documents or other evidence, that a *devastavit* has been committed.

Personal  
exemption.

Executors  
and admini-  
strators.

Although an heir having assets by descent in fee simple, is liable to be sued in the *debet* and *detinet*, (d) on the obligation of his ancestor; yet the action, being rather instituted to recover the value of the assets descended and in his possession, than brought against him personally, he cannot be holden to bail on his ancestor's bond.

Heirs.

The same rule and reasoning apply to devisees, chargeable under the statute 3 & 4 W. & M. c. 14.

Devisees.

As the legal effect of the marriage contract is to vest in the husband the whole of the personal estate of his wife, and the future profits of her industry, she is in general, during the period of her coverture, privileged from arrest. This exemption is founded upon the strictest principles of justice. The feme having relinquished the means of liquidating her debts, ought not to be subject to bailable process, either separately or jointly with her

Feme co-  
verts.  
When ex-  
empt from  
being holden  
to bail.

(b) *Page v. Price*, 1 Salk. 98. *Boothsby v. Buller*, Sid. 63. *Dubray v. ———* Comb. 206. 2 Bac. Ab. 447. Buls. 317.

(c) *Dubray v. ———* Comb. 206. 2 Bac. Ab. 447.

(d) Because the inheritance of the ancestor, which creates a lien upon the heir, is possessed by the heir *jure proprio*, and not *alieno*, as the personal estate is by the executor. *Gilb. Debt. B. 2. c. 1.*

Personal  
exemption.

Feme co-  
verts.  
When ex-  
empt from  
being holden  
to bail.

husband, (e) as such a practice might lead to the protracted imprisonment of the former, without any culpability being imputable to her. The interests of the creditor are adequately protected by the courts invariably refusing to discharge the husband out of custody, unless bail be put in for himself and his wife. If the feme covert be arrested alone, and these terms cannot be imposed, it is the fault of the creditor in not obtaining full and accurate information before he commenced his proceedings. It is consequently now a settled rule, that in all actions against husband and wife, the former alone ought to be holden to bail. (f)

The circumstance of the debt having been incurred by the feme whilst sole, and her husband having since absconded, will not debar her of her right to be discharged; (g) though where they had been jointly sued upon a contract entered into before the marriage, and both arrested, the Court of Common Pleas refused to recognize her privilege; (h) The only difference between these cases appears to be, that in the former, the wife alone was in custody; in the latter, both had been arrested; but it is conceived, that as this distinction is inconsistent with the regular and uniform practice, and the principles on which the right of a feme covert to be dis-

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(e) This principle obtains, whether the wife be arrested with or without her husband; upon process against her and her husband jointly, or against her alone. *Anon. Cro. Jac. 445. Whitfield v. Holmes, 1 Lev. 216. 1 Vent, 49. Lit. Rep. 18. Biron v. Bickley, 1 Sid. 20. Edwards v. Rourke, 1 T. R. 86. Crookes v. Fry, 1 B. & A. 165. Pritchett v. Cross, 2 H. Bl. 17. Pearson v. Meadow, 2 Bl. Rep. 903. Pitt v. Thompson, 1 East, 16.*

(f) *Waters v. Smith, 6 T. R. 451. Pitt v. Thompson, 1 East, 16. Wilson v. Serres, 3 Taunt. 307. Wardell v. Gooch, 7 East, 582. 3 Smith, 576. s. c. Collins v. Rowed, 1 N. R. 54.*

(g) *Crookes v. Fry, 1 B. & A. 165. Newcome v. Hornblower, id. 255. n.*

(h) *Robarts v. Mason, 1 Taunt. 254.*

charged out of custody is founded, it would scarcely be considered as sustainable, at least it seems it would not be adopted in the Court of King's Bench; for Mr Justice Bayley, in *Crookes v. Fry*, (i) after referring to the decision of the Common Pleas, said, "It has been the constant practice of the Court of King's Bench, where husband and wife are both arrested on mesne process, that the wife shall be discharged; but the husband cannot be discharged without putting in bail for both."

Personal exemption.

Feme covert. When exempt from being holden to bail.

As the relation of marriage is not suspended by the circumstance of the wife living apart from her husband, with a separate maintenance, her privilege remains unaffected, notwithstanding such an event. In a recent case, (l) where a feme covert, separated from her husband, by a divorce *a mensa et thoro*, was holden to bail, whilst an appeal against the sentence was pending; the court, on motion, ordered the bail-bond to be cancelled, on the feme entering a common appearance. So where a feme covert had been trusted by a creditor, knowing her to be a married woman, though living separate from her husband, she was ordered to be discharged; (m) and it has been even determined that where the plaintiff, at the time of giving the credit to the wife, knew that she had a husband living abroad, though under terms of separation, that she was entitled to be released from custody. (n) It is conceived that the fact of the husband having abandoned her for adultery, would make no difference. (o)

A mere inadvertent misrepresentation by a *feme covert*

(i) 1 B. & A. 165.

(l) *Hookham v. Chambers*, 3 B. & B. 92. And see *Anstey v. Manners*, 1 Gow. 10.

(m) *Wardell v. Gooch*, 3 Smith, 576. 7 East, 582. s. c. *Wilson v. Serres*, 3 Taunt. 307.

(n) *March v. Capelli*, 1 East, 17. n.

(o) *Marshall v. Rutton*, 8 T. R. 545. See *Cox v. Kitchen*, 1 B. & P. 338.

Personal  
exemption.

Feme co-  
verts.

When ex-  
empt from  
being holden  
to bail.

of her real situation, will not deprive her of this privilege; hence the court discharged a married woman, who, at the time she incurred the debt, without any intention to impose upon the plaintiff, informed him that her husband was dead. (p) The fact of the defendant, at the time the credit was obtained, having appeared as a *feme sole*, and carried on business on her own account, will not affect her general exemption; for although at one time (pp) the privilege of a married woman was conceived to depend upon the notoriety of her coverture, it has been recently determined, that a suggestion that the plaintiff was ignorant of the marriage, would be unavailable. (q)

A married woman will be released from custody, when arrested on a penal statute. (r)

When not  
exempt from  
being holden  
to bail.

As the practice of discharging married women out of custody, is founded upon the summary interposition of the court upon equitable grounds, they will not in general interfere, where the party, on whose behalf the application is made, has contributed to impose on the plaintiff by fraudulently representing her actual condition, by describing herself as a *feme sole*, (s) but will leave her to plead her coverture in the ordinary course of procedure. (t)

It was finally determined, in *Marshall v. Rutton*, (u) that a *feme covert* could not be impleaded as a single woman, while the relation of marriage continued, and

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(p) *Pitt v. Thompson*, 1 East, 16.

(pp) *Pearson v. Meadow*, 2 Bl. Rep. 903.

(q) *Collins v. Rowed*, 1 N.R. 54. [(r) *Pritchett v. Cross*, 2 H. Bl. 17.

(s) *Pearson v. Meadow*, 2 Bl. Rep. 903.

(t) *Collins v. Rowed*, 1 N. R. 54. *Partridge v. Clarke*, 5 T. R. 194.

(u) 8 T. R. 545. In a court of equity, *baron* and *feme* are considered as distinct persons. Hence a *feme covert* may be sued as a *feme sole*. *Dubois v. Hole*, 2 Vern. 614, or sue her own husband by *prochein amy*. 3 Cox, P. Wms. 39.

she and her husband were living in the kingdom, although she lived apart from him, and had a separate maintenance secured to her by deed ; yet the policy of that law, which considers a married woman as incapable of suing or being sued without her husband, admits of some modifications from the peculiar situation of the parties ; as where the wife has acquired a separate character from the civil death of her husband, by his having abjured the realm ; (x) or being transported either for life, or a term of years ; (y) or from his not returning after the period of his transportation has elapsed. (z) Under any of these circumstances, the pre-existing disabilities of the wife are suspended, and she may be sued as a *feme sole* ; and it is conceived, that if she were arrested, the courts would not discharge her on common bail.

Personal exemption.

Feme covert.

When not exempt from being holden to bail.

Where the husband is an alien, resident abroad, and the wife remains in this country, trading and acquiring credit as a single woman, she will be, as such, responsible for the debts she may incur, and liable to be holden to bail : (a) and in a subsequent case, the Court of Common Pleas refused to discharge a defendant, on the ground of coverture, she and her husband being both foreigners, and the latter resident abroad, though she was not separated from him by deed, had no separate maintenance, nor had ever represented herself as a single woman, (b) and expected her husband speedily to return to England. It is observable, that in both these cases, the husband was an *alien* resident abroad,

(x) 1 Inst. 133. Belknap's case, 2 H. 47. Marsh v. Hutchinson, 2 B. & P. 231. See Thom. Co. Litt. 134.

(y) Sparrow v. Carruthers, cited in 2 Bl. Rep. 1197, and in Corbett v. Poelnitz, 1 T. R. 6. Jewson v. Read, Lofft. 142.

(z) Carrol v. Blencow, 4 Esp. 27.

(a) De Gaillon v. L'Aigle, 1 B. & P. 8. 357. s. c. See also Franks v. Duchess de la Pienne, 2 Esp. 587. Walford v. Same, id. 554. Sed vide Kay v. Same, 3 Camp. 123. contra.

(b) Burfield v. Duchess de la Pienne, 2 N. R. 380.

Personal  
exemption.

Feme co-  
verts.

When not  
exempt from  
being holden  
to bail.

and it may be inferred from the decision in *Marsh v. Hutchinson*, (c) that if the husband was a native of this country, and capable of returning, that a different practice would be adopted. In the case just alluded to, the husband was an *Englishman*, and had been employed in the service of the British Government, in a foreign country ; but in consequence of a war between the two countries, and the cessation of his employment, he had sent his wife and family home, but continued to reside abroad ; it was determined, that the lengthened absence of the husband on the continent, did not render her liable to be sued as a feme sole. (d)

When a feme covert has been arrested as the acceptor of a bill of exchange, at the suit of an *indorsee*, the court will not order the bail-bond to be cancelled, on an affidavit that the *drawer*, when he drew the bill, knew the defendant to be a married woman ; but she must find special bail, and plead her coverture, or bring a writ of error. (e) Accepting a negotiable security, is in effect, representing herself as a single woman, and enables the drawer to impose on a third person. So where a woman was arrested, as the drawer of a bill of exchange, at the suit of an *indorser*, the court refused to discharge her, on the affidavit of a *third* person, that she was a married woman ; (f) though in a subsequent case, (g) where a

(c) 2 B. & P. 226.

(d) "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time, by the King's Privy Seal. There is not any case where the wife has been holden liable, the husband being an Englishman." Per Heath, J. in *Marsh v. Hutchinson*, 2 B. & P. 233. See also *Farren v. Countess of Granard*, 1 N. R. 80. where Heath, J. said, "The case of *De Gallion v. L'Aigle*, proceeded much upon the ground of the defendant's husband being a foreigner."

(e) *Pritchard v. Cowlan*, 2 Marsh. 40.

(f) *Jones v. Lewis*, 2 Marsh. 385. 7 Taunt. 55. s. c.

(g) *Holloway v. Lee*, 2 Moore. Rep. 211.



married woman had been arrested, as acceptor of a bill of exchange, at the suit of an *administratrix*, to whose intestate the bill had been indorsed, the court ordered the bail-bond to be delivered up, and cancelled; on an affidavit, that the *drawer* and *intestate*, knew at the time the bill was drawn, accepted, and transferred, that the defendant was a feme covert.

Personal exemption.

Feme coverts.

When not exempt from being holden to bail.

When a married woman has been arrested, either alone, or with her husband, and has not by any improper conduct forfeited her right to be discharged; the court, out of which the process issued, ought to be moved upon *her own affidavit* (*h*) of the marriage, and that her husband is alive, to be discharged out of custody; or if she has given a bail-bond, that it may be delivered up to be cancelled, on filing common bail, or on entering a common appearance. (*i*) This is the usual practice where the coverture is not doubtful, (*k*) or she has not obtained credit by wilfully misrepresenting herself as a *feme sole*; (*l*) but wherever either of these difficulties arise, the court, as it has been already seen, will invariably compel her to find special bail, and plead her coverture, or bring a writ of error. (*m*)

How discharged when arrested.

When husband and wife are both arrested on mesne process, and the wife is entitled to her privilege of exemption, the husband cannot be discharged out of custody, without putting in bail for himself and his wife: (*n*)

(*h*) It is an inflexible rule that the fact of the coverture cannot be established by the affidavit of a third person, *Jones v. Lewis*, 7 Taunt. 55. 2 Marsh. 285. s. c.

(*i*) *Pearson v. Meadow*, 2 Bl. 903. *Partridge v. Clark*, 5 T. R. 194. *Pitt v. Thompson*, 1 East, 16. *Crookes v. Fry*, 1 B. & A. 165.

(*k*) *Pearson v. Meadow*, 2 Bl. 903.

(*l*) *Partridge v. Clark*, 5 T. R. 194.

(*m*) *Ibid.*

(*n*) *Anon.* 1 Vent. 49. 1 Mod. 8. s. c. *Cornish v. Marks*, 6 Mod. 17. *Slater v. Slater*, 1 Lev. 1. *Crookes v. Fry*, 1 B. & A. 165. *Edwards v. Rourke*, 1 T. R. 486. *Clark v. Norris*, 1 H. Bl. 235. *Coulson v. Scott*, 1 Chit. Rep. 75.

Personal  
exemption.

Feme co-  
verts.

Costs on  
motion for  
her dis-  
charge.

though where in a joint action against husband and wife, the former *alone* has been arrested, bail may justify for him only, on his filing common bail for the latter. (o)

Where a plaintiff, with the full knowledge of her coverture, sues a married woman as a feme sole, and arrests her as such; the court will compel him to pay the costs of the motion for her discharge. (p) But where husband and wife are both arrested, and the latter necessarily a party to the action, the court, upon making the rule absolute for discharging her from custody, will not grant the costs incurred by the application. (q) The difference between these two decisions, appears to be; that in *Wilson v. Serres*, (r) the wife was arrested as a feme sole, without her husband; and the parties, therefore, violated a known and established rule of law: but that in the last case, they might easily misconceive the practice, and imagine, that as the wife was properly and necessarily made a party to the suit, she might also be arrested.

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## SECTION II.

### OF TEMPORARY EXEMPTION.

IN endeavouring to explain the nature and extent of temporary exemption, it may be expedient to adopt the following arrangement. 1st. Persons privileged from attending courts of justice. 2dly. The particular courts which confer an exemption on persons attending them. 3dly. Persons temporarily protected from other causes than attending courts of justice.

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(o) *Coulson v. Scott*, 1 Chit. Rep. 75.

(p) *Wilson v. Serres*, 3 Taunt. 307.

(q) MSS. M. T. 3 Geo. 4. *Taylor v. Whittaker*, 2 D. & R. 225. s. c.

(r) 3 Taunt. 307.

Every person who has any relation to a suit, whether his presence in court be compulsory or not, is exempt from being holden to bail, provided his attendance be not given under a mere colourable pretence of obtaining protection. (s) Parties apprehensive of arrest, ought not to be deterred from attending the place of trial, when the interest of their cause renders it necessary. Hence, the courts have uniformly manifested an inclination, rather to extend than circumscribe the limits of this privilege.

Temporary exemption.

1st. Persons attending courts of justice.

As the cases are numerous, the privilege of parties to a civil suit may be considered as it regards their exemption *eundo, morando, et redeundo*.

Parties to a cause.

A suitor coming *bona fide* from abroad, or any part of the kingdom, to attend a court of justice, is privileged during the period of his journey. (t) This right to protection is liberally construed; for in a recent case where the defendant in London went to attend an inquiry at Exeter, but deviated from the direct road, by going to Clifton, where his wife then resided, at which place he stayed the greater part of two days, for the alleged purpose of searching for papers necessary to conduct his cause; it was held by the majority of the Court of Exchequer, that the defendant, under such circumstances, ought not to have been holden to bail. (u)

Parties to a cause *eundo*.

When a party coming to attend the trial of his cause

(s) 2 Roll. Abr. 272. 2 Lill. Prac. Reg. 369. Gilb. C. P. 207. Anon. 1 Mod. 66. Meekins v. Smith, 1 H. Bl. 636. Kinder v. Williams, 4 T.R. 377. Anon. 2 Salk. 544. Johannet v. Lloyd, Barnes, 27. Harrison's case, id. 378. Rimmer v. Green, 1 M. & S. 638. Solomon v. Underhill, 1 Campb. 229. Lightfoot v. Cameron, 2 Bl. Rep. 1113. Childerston v. Barrett, 11 East, 439.

(t) Bro. Abr. 6. tit. privilege. Lightfoot v. Cameron, 2 Bl. Rep. 1113. Rastall, tit. Privilege.

(u) Ricketts v. Gurney, 1 Chit. Rep. 682. 7 Price, 699. s. c. Graham and Wood, Barons, (contra Garrow, B.) considered the party to be privileged. But the majority of the Court of King's Bench held, that the party had no right to be discharged. 1 Chit. Rep. 679, 3 B. & A. 252. s. c. Abbott, C. J. dissentiente.

Temporary  
exemption.

1st. Persons  
attending  
courts of  
justice.

Parties to a  
cause *cundo*.

is arrested, the judge at *nisi prius* will immediately grant a *habeas corpus*, (x) or order the officer who executed the process to attend, to shew cause why the party should not be discharged *instante*. (y)

If any collusion can be shewn to exist between the opposite party and the creditor, at whose suit he was arrested, the trial will be put off without payment of costs until he is released; but unless such collusion appear, the trial can only be postponed, on the condition of *paying the costs*. (z)

Parties to a  
cause  
*morando*.

Either a plaintiff or defendant, remaining *bona fide* within the precincts of the court, in expectation of the trial of his cause, is protected fromailable process. This immunity is allowed, although the suit in question is not inserted in the list of particular causes, appointed to be tried by the judge, on the day of the arrest. Therefore, where a plaintiff, attending from day to day at the sittings, in expectation of his cause being tried, was arrested before the actual day of trial, in a coffee house adjacent to the court, he was ordered to be discharged. (a) And it would seem that the judge, presiding at *nisi prius*, would immediately, under such circumstances, grant a *habeas corpus*. (b)

Parties to a  
cause  
*redeundo*.

A reasonable time is also permitted to individuals to return home, after the determination of the trial, in which they are interested. Upon this principle, where a party to a suit, attending a cause at the sittings for Middlesex,

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(x) *Solomon v. Underhill*, 1 Campb. 229. *Ex-parte*, Tillotson, 1 Stark. 470. Anon. sittings at Westminster, October 19, 1822. Per Abbott, C. J., MSS.

(y) Sittings after Trinity Term, 1817, MSS. cited 1 Archbold's Prac. 69.

(z) *Solomon v. Underhill*, 1 Campb. 229. Anon. sittings at Westminster, October 19, 1822. Per Abbott, C. J., MSS.

(a) *Childerston v. Barrett*, 11 East, 439.

(b) *Solomon v. Underhill*, 1 Campb. 229. *Ex-parte*, Tillotson, 1 Stark. 470.

which was postponed early in the day, continued in court until five o'clock in the afternoon, and afterwards retired with his attorney and witnesses to a tavern in New Palace Yard, where he was arrested, during dinner; the court determined, that taking such a necessary refreshment did not annul his privilege *redeundo*. (c) So, a defendant arrested in returning from attending on the court, to justify bail, was ordered to be discharged. (d)

Temporary exemption.

1st. Persons attending courts of justice. Parties to a cause *redeundo*.

Witnesses, as well as suitors, attending courts of justice, are privileged from arrest, *eundo, morando, et redeundo*. (e) And in ordinary cases, it is not necessary for the protection of a witness, that he should have been served with a *subpœna*. (f)

Witnesses.

Although, in strictness, this privilege does not authorize a witness to loiter on, or deviate from the direct road, yet the courts have not been very rigorous in limiting this protection to the shortest interval. As, where a witness attending a trial, which terminated about four in the afternoon, remained in the assize town until after dinner on the following day, and whilst returning home was arrested about seven o'clock in the evening; the court ordered her to be released from custody, though her residence was not above 20 miles from the place of trial; (g) but from a subsequent decision, it appears, that if a cause be concluded in the afternoon, and a witness, whose place of abode is only 12 miles distant, remain until 11 o'clock the next morning, the *subpœna* is no protection from arrest in the assize town. (h)

(c) *Lightfoot v. Cameron*, 2 Bl. Rep. 1113.(d) *Johannet v. Lloyd*, Barnes 27.(e) *Lightfoot v. Cameron*, 2 Bl. Rep. 1113. *Meekins v. Smith*, 1 H. Bl. 636. But a witness may be taken when attending court, and surrendered by his bail. *Horn v. Swinford*, 2 D. & R. N. P. C. 20.(f) *Arding v. Flower*, 8 T. R. 534. 3 Esp. 117. s. c. Sed vide Anon. 2 Salk. 544.(g) *Hatch v. Blisset*, Gilb. Rep. 308. s. c., cited 2 Stra. 986. 4 Bac. Ab. 226.

(h) 1 Smith, 355.

Temporary  
exemption.

1st. Persons  
attending  
courts of  
justice.  
Witnesses.

A witness, however, is not compelled to avail himself of the nearest road to his place of residence ; and when he has not abused the privilege for the purpose of transacting business, unconnected with the cause in which he was engaged, he will be entitled to be liberated from custody. (i)

It has been intimated, that the proper mode of obtaining the discharge of a person in attendance, as a witness in an action appointed for immediate trial, is to bring him up before a judge at chambers, by writ of *habeas corpus* : (k) but it appears, that the judge presiding at *nisi prius*, may order the sheriff's officer, who made the arrest, to produce him in court on the day nominated for the trial. (l)

Attorney or  
solicitor at-  
tending  
court.

An attorney, who may from particular circumstances have incapacitated himself from enjoying his ordinary privilege as an officer of the court, is, during the progress of a cause which requires his attendance, exempt from arrest *eundo, morando, et redeundo*. Thus, an attorney, coming to and returning from attending a summons at a judge's chambers, or whilst present at the execution of a writ of inquiry, (m) is protected from being holden to bail ; but where an attorney had been conducting a cause at the Middlesex sittings, in term, which was put off to the adjournment day, after which he retired with his

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(i) *Willingham v. Matthews*, 6 Taunt. 358. s. c. 2 Marsh, 57.

(k) *Ex-parte, Tillotson*, 1 Stark, 470.

(l) *Anon.* sittings after T. T. 1822, for Middlesex. Mr. Marryatt applied to the court to order the discharge of a person, who was subpoenaed as a witness, in a cause which was to come on the following Monday, but who was arrested in a civil suit by a sheriff's officer, at a public house, at the corner of Great George-street, on Friday. Abbott, C. J. ordered that the officer should bring the witness into court on Monday morning. All witnesses must, he said, be protected in their attendance upon a court of justice, and also be allowed a reasonable time for returning and refreshment. MSS.

(m) *Pigot v. Charlewood*, Barnes, 200.

witnesses to a coffee house, where he was arrested, on an attachment for nonpayment of money, three hours after the court had risen; it was adjudged, that so protracted a period to confer with his witnesses, was unnecessary. In the same case, the attorney having been discharged on payment of the money for which the attachment had been issued, was taken in execution as he was leaving the court, it was determined that as he had already been in legal custody, he was not entitled to any privilege *redeundo*. (n)

Temporary exemption.

1st. Persons attending courts of justice.

Attorney or solicitor attending court.

A solicitor, arrested while going from (o) or returning to (p) his place of residence, without any unnecessary delay, or without deviation, for the purpose of conducting his client's business at Lincoln's Inn Hall, will be discharged by the Lord Chancellor, after personal examination and oath administered to him by the register. (q)

A barrister on the circuit, or attending court, is privileged from arrest. (r)

Barristers.

So are jurors. (s)

Jurors.

The privilege of persons connected with a civil cause, is not confined to an attendance in the superior courts of law, but extends to every tribunal established for, or connected with, the administration of justice. (t)

2dly. The particular courts which confer an exemption on persons attending them

Courts of Equity, will, therefore, on motion or petition, order persons arrested, during their attendance on them, to be discharged. (u) The application must be made to

Courts of equity.

(n) *Rex v. Priddle*, M. 27 G. 3. K. B., cited 1 Tidd, 222.

(o) *Castle's case*, 16 Ves. 412.

(p) *Gascoyne's case*, 14 Ves. 183.

(q) See *Castle's case*, 16 Ves. 412. *Gascoyne's case*, 14 Ves. 183.

(r) *Meekins v. Smith*, 1 H. Bl. 636.

(s) *Latch*. 198. *Meekins v. Smith*, 1 H. Bl. 636.

(t) *Ogle's case*, 11 Ves. 556. *Castle's case*, 16 Ves. 413. Brownl. 15. Com. Dig. privilege A. a.

(u) *Ex-parte*, King, 7 Ves. 314. *Bromley v. Holland*, 5 Ves. 2. *Ogle's case*, 14 Ves. 183. *Castle's case*, 16 Ves. 413.

Temporary exemption.

2dly. The particular courts which confer an exemption on persons attending them. Commissioners of bankrupts.

the court, of which the proceeding is a contempt. (x) The proper course is an order upon the sheriff to discharge the party arrested, (y) and if the former be proceeded against as for an escape, in consequence of having obeyed the order of a court of equity, an injunction will be granted. (z)

Every person in obedience to a summons, (a) or verbal notice from a messenger, (b) or even voluntarily (c) attending commissioners of bankrupts, sitting as a court for the administration of justice, is entitled to protection from arrest *eundo, morando, et redeundo*.

Hence, a creditor attending without a summons to prove his debt under the commission, is entitled to protection. (d) This privilege even extends to a witness, who, upon his own importunity, is summoned by the commissioners. (e)

Duration of the privilege, whilst attending commissioners of bankrupts.

As to the duration of this exemption, it has been decided, that where the meeting is adjourned, and the person attending the commissioners retires into another room in the same house, until the expiration of the time of the adjournment, his right to protection is not affected. (f) So if upon the examination of a bankrupt at a private meeting, a witness voluntarily attending without a summons or notice from the commissioners, and tendering himself to be examined, as to circumstances relating to that part of the bankrupt's estate, which is the

(x) 2 Ves. & Beames, 374. (y) Ex-parte, Ledwick, 8 Ves. 598.

(z) Gascoyne's case, 14 Ves. 183. Castle's case, 16 Ves. 412. And see Ricketts v. Gurney, 1 Chit. Rep. 682.

(a) Ex-parte, Dick, cited in argument, 2 Bl. Rep. 1142. Ex-parte, Stow, cited same book. Kinder v. Williams, 4 T. R. 377. Ex-parte, King, 7 Ves. 313. Darby v. Baugham, 5 T. R. 209.

(b) Arding v. Flower, 8 T. R. 534. 3 Esp. 117. s. c.

(c) Per Lord Kenyon, in Arding v. Flower, 8 T. R. 534, and 3 Esp. 117. s. c. and see Ex-parte, King, 7 Ves. 316. Ex-parte, Byne, 1 Rose, 451. 1 Ves. & Beames, 317, s. c.

(d) Ex-parte, King, 7 Ves. 312. See Kinder v. Williams, 4 T. R. 377.

(e) Ex-parte, Kerney, 1 Atk. 54. (f) Ex-parte, Russell, 1 Rose, 278. Ex-parte, Temple, 2 Rose, 22. 2 Ves. & Beames, 391. s. c.



subject of inquiry, be requested by the commissioners to retire until the examination of the bankrupt, and other persons have been concluded, and when returning home, be arrested, he is entitled to his discharge. (g)

It seems, that the commissioners have not power to order the discharge of a person arrested, although he may be entitled to protection; (h) nor will the court, out of which the process issued, interfere; (i) but the party must apply by motion, (k) or petition, (l) to the Lord Chancellor. The former is the most correct mode of proceeding. (m) When that course is adopted, the order is drawn up as a proceeding in the bankruptcy. (n)

Upon a motion for the party's discharge, his attendance does not appear absolutely necessary; (o) though the usual practice is for him to be present, in order that he may be sworn by the register, and examined by the Lord Chancellor. (p)

The rule, by which the fact of the arrest is to be investigated, is, that the court must believe the affidavit, so far as it is not contradicted by the person, against whose arrest the application seeks relief. (q) The motion for the debtor's discharge, when it only affects the inte-

Temporary exemption.

2dly. The particular courts which confer an exemption on persons attending them.

Commissioners of bankrupts. Application for discharge

(g) *Ex-parte*, Byne, 1 Rose, 451. 1 Ves. & Beames, 317. s. c.

(h) *Kinder v. Williams*, 4 T.R. 377. *Ex-parte*, King, 7 Ves. 314.

(i) *Kinder v. Williams*, 4 T.R. 377. *Ex-parte*, King, 7 Ves. 312. *Ex-parte*, List, 2 Rose, 24. 2 Ves. & Beames, 373. s. c., but see *Ricketts v. Gurney*, 1 Chit. Rep. 682. *Walker v. Webb*, 3 Anstr. 941. *Spence v. Stuart*, 3 East, 89. contra.

(k) *Ex-parte*, King, 7 Ves. 312. *Ex-parte*, Johnson, 14 Ves. 37. 16 Ves. 412. 1 Rose, 230. 1 Ves. & Beames, 317. 3 id. 23.

(l) *Ex-parte*, Kerney, 1 Atk. 53. *Ex-parte*, Gibbons, id. 238. *Ex-parte*, Ross, 1 Rose, 260. *Ex-parte*, Russell, id. 278. *Ex-parte*, List, 2 Rose, 24. 2 Ves. & Beames, 373. s. c.

(m) *Ex-parte*, Byne, 1 Ves. & Beames, 317. 1 Rose, 451. s. c.

(n) *Ogle's case*, 11 Ves. 556. *Castle's case*, 16 Ves. 413.

(o) *Ex-parte*, Byne, 1 Ves. & Beames, 317. 1 Rose, 451. s. c.

(p) *Castle's case*, 16 Ves. 413. *Gascoyne's case*, 14 Ves. 183. In the latter case his Lordship administered the oath, and examined the party himself, in the absence of the Register.

(q) *Ex-parte*, Byne, 1 Ves. & Beames, 317. 1 Rose, 451. s. c.

Temporary exemption.

2dly. The particular courts which confer an exemption on persons attending them.

Commissioners of bankrupts. Costs of motion for discharge.

Insolvent debtors' court.

Arbitrators.

rests of the creditor, at whose suit he was arrested, may be immediately granted; but where there are other detainers, the court must hear the persons by whom they were lodged, for the purpose of investigating whether they are founded upon the process, which was the cause of the original contempt. (r)

The costs incident to such an application, are regulated by the fact, whether the contempt is or is not intended? Where circumstances indicate the former, the solicitor and the officer will be ordered to pay the costs; although it seems more just and equitable, that such payment ought to be made by the solicitor. (s)

Persons attending the Insolvent Debtors' Court, on matters connected with the discharge of an insolvent, are protected from arrest, *eundo, morando, et redeundo*. (t)

Parties to a cause, or witnesses in attendance upon an arbitration, to be examined under an order or a rule of court, (u) are exempt from being holden to bail. Although the courts allow a liberal and extensive latitude to the privilege of persons in this situation, yet the defendant must have been arrested in the *bona fide* performance of a duty, required of him by the arbitrator's summons.

In a recent case, the time allowed to go and return for this purpose, was much discussed. A defendant, in London, was summoned to attend an arbitration at Exeter, but leaving the direct road, went to Clifton, where his wife then resided, for the alleged purpose of searching for papers necessary for his examination, where he stayed

(r) Ex-parte, King, 7 Ves. 313.

(s) Ex-parte, Ross, 1 Rose, 260. Ex-parte, King, 7 Ves. 317, 318. Ex-parte, List, 2 Rose, 24. 2 Ves. & Beames, 373. s. c.

(t) Willingham v. Matthews, 6 Taunt. 356. 2 Marsh. 57. s. c.

(u) Randall v. Gurney, 1 Chit. Rep. 679. s. c. 3 B. & A. 252. Id. ibid. Moore v. Aylet, Dick. 780. Moore v. Booth, 3 Ves. 350. 2 Ves. & Beames, 395. Helley's case, T.T. 1788., cited Com. Dig. Privilege. A. 1. Spence v. Stewart, 3 East, 29. See Arding v. Flower, 8 T. R. 536. Cald. Arb. 46.

the greater part of two days; the majority of the Court of King's Bench held, that although it might not be an unreasonable deviation, yet it not being sworn that the time was continually and fairly employed in accomplishing the object for which he had gone to that place, he was not protected from arrest; (x) but on an application supported by similar affidavits, the Court of Exchequer considered the party to be privileged. (y)

Temporary exemption.

2dly. The particular courts which confer an exemption on persons attending them. Arbitrators.

So in *Spence v. Stuart*, (z) where the arrest took place early in the morning, before it could be ascertained whether the party intended to return home or not; the defendant was held to be clearly exempt from bailable process, as it did not appear that he had been guilty of any negligence in not availing himself of his privilege *redeundo*, within a reasonable time.

As to whether persons attending an arbitration, not authorized or sanctioned by an order or rule of court, are privileged from being holden to bail, there does not seem to be any express adjudication; but it is presumed, that arbitrators who merely derive their appointment from the voluntary act of the parties interested, would not be entitled to protection from arrest.

The application to be discharged out of custody, may be made either to the court, under whose order or rule the arbitrators were acting, or that court from whence the process issued upon which the party was arrested. For this immunity is not, as has been supposed, founded on the contempt of the court, but proceeds upon the positive right of the individual to be exempt from the civil process of any jurisdiction. Thus, a bail-bond was set aside in consequence of an arrest upon process out of the Court of King's Bench, although the party's claim to the privilege

Application for discharge.

(x) *Randall v. Gurney*, 3 B. & A. 252. 1 Chit. Rep. 679. s. c.

(y) *Ricketts v. Gurney*, 1 Chit. Rep. 682. 7 Price, 699. s. c.

(z) 3 East, 91.

Temporary  
exemption.

2dly. The  
particular  
courts which  
confer an  
exemption  
on persons  
attending  
them.  
Arbitrators.  
Costs of  
motion for  
discharge.

Quarter  
sessions.

Courts mar-  
tial.

was derived from his being attendant upon a reference under a rule of the Court of Common Pleas, (a) which has been since recognized as the general practice.

Where the plaintiff or his attorney is cognizant of the purpose for which the defendant was in attendance, when the arrest took place, or knew that he was going to or returning from an arbitration, in obedience to a summons ; (b) the court, in order to afford adequate protection to witnesses under such circumstances, will grant the party his costs on making the rule absolute for his discharge. (c)

Justices and clerks of the peace, and other officers attending the sessions, are protected from being holden to bail *eundo, morando, et redeundo*. (d)

By the Mutiny Act, (e) " witnesses summoned by the judge advocate, or a person officiating as such, shall, during their necessary attendance on courts martial, and in going and returning from the same, be privileged from arrest in like manner, as witnesses attending any of his Majesty's courts of law, are privileged ; and if any such witness shall be unduly arrested, he shall be discharged from such arrest by the court, out of which the writ or process issued, by which such witness was arrested ; or, if the court be not sitting, then by any judge of the Court of King's Bench, &c. as the case shall require, upon its being made appear to such court, or judge, by affidavit in a summary way, that such witness was arrested in going to, or returning from, or attending upon, such court martial."

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(a) *Spence v. Stuart*, 3 East, 89. *Walker v. Webb*, 3 Anstr. 941. *Ricketts v. Gurney*, 1 Chit. Rep. 682. s. c. 7 Price, 699. See vide *Kinder v. Williams*, 4 T. R. 378.

(b) *Walker v. Webb*, 3 Anstr. 941. *Ricketts v. Gurney*, 1 Chit. Rep. 682. s. c. 7 Price, 699.

(c) *Spence v. Stuart*, 3 East, 88.

(d) *Crompt. Jus.* 167.

(e) 55 G. 3. c. 108. s. 28. 1 & 2 G. 4. c. 9. s. 28.

Having now considered the privilege conferred on persons attending courts of justice, and the particular tribunals to which that exemption is extended, it will be necessary to enumerate the persons who are temporarily protected from other causes.

Temporary exemption.

3dly. Persons temporarily protected from other causes than attending courts of justice.

To enable the creditors to obtain a full disclosure of the estate of a bankrupt, it is essentially requisite that protection should be afforded to him during the period of his examination before the commissioners. The statute 5 G. 2. c. 30. s. 5. enacts, that the bankrupt in coming to surrender, shall be free from all arrests or imprisonment of any of his creditors, and after his *actual surrender* for forty-two days, (f) or any further time allowed for finishing his examination, provided he was not in custody at the time of his surrender. And if, when coming to surrender, he shall be arrested for debt, or on any escape warrant; or if, after his surrender, he shall be so arrested within the time before mentioned—then on producing the notice or summons, under the hands of the commissioners or assignees, and making it appear to the officer that such notice is signed by the commissioners or assignees, and giving him a copy thereof, he shall be immediately discharged. And in case the officer shall, after such production and notification, detain the bankrupt, he is liable to a penalty of five pounds for every day's detention.

Bankrupts.

The immunity of bankrupts from being holden to bail, may be considered, 1st, as it regards their exemption from arrest before certificate; 2dly, as it regards their exemption from arrest after certificate.

1st Exemption from arrest before the bankrupt has obtained his certificate.

The words in the statute, *actual surrender*, confer a particular and not a general privilege. Hence, it has been resolved, that until the bankrupt has actually submitted to the commission, he is only protected during such time

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(f) *Ex-parte, Leigh*, 1 G. & J. 164.

Temporary  
exemption.

3dly. Persons  
temporarily  
protected  
from other  
causes than  
attending  
courts of  
justice.

Bankrupts.

1st Exemp-  
tion from  
arrest before  
the bankrupt  
has obtained  
his certifi-  
cate.

Exemption  
from arrest  
after the  
expiration of  
the 42 days.

as might be convenient and reasonable, to enable him to give his attendance for that purpose. (g)

To entitle the bankrupt to his discharge, a positive intention to surrender himself should have been indicated, unless the bankrupt was arrested so immediately after his return from abroad, that there was not sufficient time to put any design he might have of surrendering into execution. (h) But where a bankrupt, on his return from a foreign country, with the intention of submitting himself, ascertained that the time for his surrender had been enlarged, it was determined by the court, that unless he carried his original design into execution, he was not protected from being holden to bail after the expiration of the forty-second day. (i)

If the bankrupt is summoned to attend after the expiration of the time allowed for his last examination, or after the time is enlarged, subsequent to his surrender within the limited period, he is protected from arrest; (k) although several years may have elapsed since the last meeting. (l) The bankrupt's attendance being given upon a mere notice from the messenger, without a summons from the commissioners, is not a sufficient objection to deprive him of his privilege. (m)

The surrender of the bankrupt to the commissioners, at a private as well as at a public meeting, entitles him to the benefit of this exemption, (n) and the bankrupt was held to be protected during the whole of the forty-second day; (o) though, it seems, if the period for surrendering had been

(g) *Kenyon v. Solomon*, Cowp. 156.

(h) *Ibid.*

(i) *Kenyon v. Solomon*, Cowp. 156. See *Ex-parte*, *De Fries*, Davies, 163.

(k) *Davis v. Trotter*, 8 T. R. 475. 3 Esp. 40. s. c. 15 Ves. 116. 1 Rose, 264. n. *Arding v. Flower*, 8 T. R. 534. 3 Esp. 117. s. c. *Darby v. Baugham*, 5 T. R. 209. Sed vide *Ex-parte*, *Turner*, 1 Atk. 148. 14 Ves. 36. *Kinder v. Williams*, 4 T. R. 378. (l) *Ibid.*

(m) *Ibid.*

(n) *Ex-parte*, *Wood*, 1 Rose, 46. 18 Ves. 1.

(o) 1 Buck. 80. 7 Ves. 317.

extended, a different practice would have been adopted, with reference to the last day of the enlarged time. (p)

Where the Chancellor has made an order for the commissioners to take the bankrupt's surrender subsequent to the expiration of the forty-second day, he is entitled to his right of exemption from bailable process; (q) nor is this privilege confined to his attendance before the commissioners. For it has been holden, that a bankrupt attending the hearing of a petition, for leave to surrender after the limited time is expired, is privileged from arrest. (r)

Temporary exemption.

3dly. Persons temporarily protected from other causes than attending courts of justice.

Bankrupts.

Exemption from arrest after the 42 days.

A bankrupt is not, however, privileged, where his last examination has been postponed, *sine die*. (s) The general exemption conferred on the bankrupt, can have no application to such an adjournment, which is only adopted where all further examination is deemed unnecessary; but in a similar case it had been determined, that he was protected during a voluntary attendance before the commissioners, for a purpose distinct and unconnected with his final examination. (t)

Where there has been an adjournment, a bankrupt is entitled to his discharge, notwithstanding the time limited be not indorsed upon his protection. (u)

The exemption of the bankrupt from being holden to bail, extends to all causes of arrest, connected with civil proceedings, whether the process issues from a court of law or equity; (x) even although the debt is not proveable under the commission, or has been contracted subsequent to the bankruptcy. (y)

To what causes of action the bankrupt's exemption from arrest, before certificate, extends.

(p) *Ex-parte*, Davies, 1 Buck. 80. 7 Ves. 317.

(q) *Ex-parte*, Hawkins, 4 Ves. 691. *Ex-parte*, Johnson, 14 Ves. 40. Anon. 15 Ves. 1. *Ex-parte*, Jackson, id. 118. Price's case, 3 Ves. & Beames, 23. *Ex-parte*, Davies, 1 Buck. 80. Dub.

(r) 5 Ves. 117. (s) *Ex-parte*, Woods, 1 G. & J. 75.

(t) *Ex-parte*, Ross, 1 Rose, 260. (u) Price's case, 3 Ves. & Bea. 23.

(x) *In re*—Williams, 1 Sch. & Lef. 169. *Ex-parte*, Russell, 1 Rose, 278.

(y) *Darby v. Baugham*, 5 T. R. 209. *Arding v. Flower*, 8 T. R. 534. 3 Esp. 117. s. c.



Temporary  
exemption.

3dly. Persons  
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justice.

Bankrupts.

To what  
causes of  
action the  
bankrupt's  
exemption  
from arrest  
before certi-  
ficate ex-  
tends.

Effect of  
claiming, &c.  
under the  
commis-  
sion.

As the King is not included in the statute 5 G. 2. c. 39., it has been determined, that the bankrupt is not protected from an extent during intervals of adjournment, but only when in actual attendance, or on his way to or from the commissioners. (z)

A principal being always considered as in the custody of his bail, and the language of the act 5 G. 2. c. 30. s. 5. (a) expressly excepting cases from its operation, where the bankrupt is in custody at the time of his surrender; he is not entitled to his privilege as against the rights of his bail, even while under examination; (b) but it seems, that the bail may be compelled to bring the bankrupt before the commissioners, in obedience to their order. (c) The courts will, also, enlarge the time for bail to surrender their principal, so that they may not be fixed during the period occupied by his examination before the commissioners; (d) but such an application will not be granted, unless it be sworn that it was made on behalf of the bail. (e)

Anterior to the statute 49 G. 3. c. 121. s. 14, courts of common law would not have interfered to enforce a bankrupt's discharge, after the time limited for his examination had elapsed, and before he had acquired his certificate. (f) But now the proving or claiming a debt by any creditor, shall be deemed an election, to take the benefit of such commission with respect to the debt so proved or claimed. (g) The operation of this statute is

(z) *Ex-parte*, Russel, 1 Rose, 278. *Ex-parte*, Temple, 2 Ves. & Beames, 291. 2 Rose, 22. s. c. (a) See ante, p. 91.

(b) *Ex-parte*, Gibbons, 1 Atk. 238. *Maude v. Jowett*, 3 East, 145., see *Darby v. Baugham*, 5 T. R. 210. *Ex-parte*, Parker, 3 Ves. 554. *Anderson v. Hampton*, 1 B. & A. 308, but see *ex-parte*, Leigh. 1 G. & J. 264, contra. *Horn v. Swinford*, 2 D. & R. 40. (c) *Ibid*.

(d) *Maude v. Jowett*, 3 East, 145. *Glendining v. Robinson*, 1 Taunt. 320. *Crum v. Taylor*, 1 Price, 74. (e) *Harris v. Glossop*, 2 Chit. Rep. 101.

(f) *Oliver v. Ames*, 8 T. R. 364. *M'Master v. Kell*, 1 B. & P. 302. *Hill v. Reeves*, *ibid*. 424.

(g) The following are the words of the stat. 49 G. 3. c. 121. s. 14.



not retrospective, (h) and it is confined to cases where the action is brought against the same party, under whose commission the debt was proved. (i) But the election to prove does not affect the right of third persons; as where the drawer of a bill after taking it up, sued and arrested a bankrupt acceptor, who had not obtained his certificate; the proceedings were holden to be regular, although a previous holder had proved under the commission. (k) If a creditor has two debts, in respect of distinct contracts, or in different rights, he may prove one under the commission, and proceed at law, and arrest the party on the other; (l) at least it has been determined, that the courts will not interfere in a summary manner, to stay proceedings on the bail-bond. (m) Where however, the creditor might comprise the whole demand in one action, he is not permitted to separate, and pro-

Temporary exemption.  
3dly. Persons temporarily protected from other causes than attending courts of justice.  
Bankrupts. Exemption from arrest before certificate.  
Effect of claiming under the commission.

"It shall not be lawful for any creditor, who has or shall have brought any action, or instituted any suit, against any bankrupt, in respect of any demand, which arose prior to the bankruptcy of such bankrupt, or which might have been proved as a debt under the commission of bankrupt, issued against such bankrupt, to prove a debt under such commission for any purpose whatever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same; and that the proving, or so claiming a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor, to take the benefit of such commission, with respect to the debt so proved or claimed by him: Provided always, that such creditor shall not be liable to the payment to the bankrupt, or his assignees, of the costs of such action or suit, which shall be so relinquished by him. And provided also, that where any such creditor shall have brought any action or suit, against such bankrupt, jointly with any other person or persons, his relinquishing such action or suit, against such bankrupt or bankrupts, shall not in any manner affect such action or suit, against such other person or persons." (h) *Atherstone v. Huddleston*, 2 Taunt. 181.

(i) *Young v. Hunter*, 16 East, 252. *Heath v. Hall*, 4 Taunt. 326.

(k) *Mead v. Braham*, 3 M. & S. 91. *Ex-parte, Hay*, 15 Ves. 4.

(l) *Watson v. Medex*, 1 B. & A. 121. *Harley v. Greenwood* 5 B. & A. 95. *Ex-parte, Frith*, 1 G. & J. 165. *Ex-parte, Grosvenor*, 14 Ves. 537. *Howell v. Golledge*, 5 Taunt. 174., and see cases before the 49 G. 3. c. 121: *Ex-parte, Lindsay*, 1 Atk. 220. *Ex-parte, Botterill*, id. 109. *Ex-parte, Matthews*, 3 id. 816. *Ex-parte, Grinsoy*, 1 Bro. 270.

(m) *Howell v. Golledge*, 5 Taunt. 174., But see *Ex-parte, Bonapart*, 1 Rose, 181., *Ex-parte, Hardenburgh*, id. 204.

Temporary  
exemption.

Bankrupts.

Mode of ob-  
taining dis-  
charge be-  
fore certifi-  
cate.

2dly. Ex-  
emption  
from arrest  
after certifi-  
cate.

Debts dis-  
charged by  
the certifi-  
cate.

ceed at law for part, and prove the residue under the commission. *Ex-parte Grosvenor*, 14 Ves. 587.

A bankrupt, arrested within the time allowed for his surrender, or where the debt has been claimed or proved, may obtain his discharge by application to the Lord Chancellor, or to the court in which the action was brought; (n) but the application in a Court of Equity, must be obtained in the usual course by petition, and will not be granted on motion, unless the arrest has been made under circumstances amounting to a contempt. (o)

It is a clear and established principle, that the discharge of a bankrupt should be commensurate with the relief afforded to the creditor, and consequently, that all debts that either have been, or that might have been proved, are discharged by the certificate; but where the debt would not be proveable under the commission, the bankrupt's being subject to be holden to bail, and the creditors inability to prove, are convertible terms. (p)

By the stat. 46 G. 3. c. 135. s. 2., a bankrupt is protected from arrest in respect of debts due before the date, and issuing of the commission; and this privilege has since been extended (q) to debts contracted *bona fide* for a valuable consideration, and payable conditionally after the bankruptcy of the debtor, whether they be derived from verbal or written contracts. But

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(n) *Ex-parte*, Dickson, 1 Rose, 98. *Atherstone v. Huddleston*, 2 Taunt. 181. *Davis v. Trotter*, 8 T. R. 475.

(o) Anon. 1 Rose, 230., and see *Castle's case*, 16 Ves. 413. *Gascoyne's case*, 14 Ves. 183. s. p. It may not be irrelevant to suggest, that if a person against whom a commission of bankruptcy is sued, obtains his discharge out of custody, on the ground of the bankruptcy, he is precluded from afterwards contesting the validity of the commission, in a court of law. *Goldie v. Gunston*, 4 Campb. 381. *Like v. Howe*, 6 Esp. 20.

(p) 5 G. 2. c. 30. *Ex-parte*, Groome, 1 Atk. 119. *Bamford v. Burrell*, 2 B. & P. 1. *Chilton v. Whiffin*, 3 Wils. 13

(q) 49 Geo. 3. c. 121. See *Tully v. Sparkes*, 2 Ld. Raym. 1546. Anon. 2 P. Wms. 395. *Cowp.* 540. *Hoskins v. Duperoy*, 9 East, 498.

as it would unavoidably exceed the limits prescribed to this work, and perhaps be in some degree unconnected with its particular object, to enumerate all the claims that are or are not capable of being proved; it will suffice merely to advert to the general and leading principles, deducible from the multifarious cases on the subject, instead of enumerating them with any degree of particularity. It is therefore proposed, as the most simple and perspicuous method, to consider the general rules with reference to the particular class of contracts, or other causes of action to which they appertain.

Temporary  
exemption.

Bankrupts.

Before the making of the statute 49 G. 3. c. 121. s. 17., unless an annuity had been secured by a bond, which was forfeited by the non-payment of the arrears before the bankruptcy, the grantee could not have proved the value of it as a debt under a commission issued against the grantor, (r) And, consequently, notwithstanding the certificate, the defendant might have been arrested and held to special bail, in an action brought for money paid, or for arrears of the annuity which had become due after the issuing of the commission. But now, by the 17th section of the above statute, it shall be competent for any annuity creditor of any person against whom a commission of bankruptcy shall issue, whether the sum shall be secured by bond or covenant, or any other assurance or assurances, and whether there shall or shall not be any arrears of the annuity at or before the

Annuity.

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(r) *Fletcher v. Bathurst*, 7 Vin. 71. *Cotterell v. Hooke*, Doug. 97. *Ex-parte Mitford*, 1 Bro. 398., *ex-parte Burrow*, 1 Bro. 268., *ex-parte Le Compte*, 1 Atk. 251., *ex-parte Belton*, 1 Atk. 251., *ex-parte Artis*, 2 Ves. 489., *ex-parte James*, 5 Ves. 708., *ex-parte Bennet*, 2 Atk. 527., *ex-parte Winchester*, 1 Atk. 115., *ex-parte Groome*, 1 Atk. 119., *Perkins v. Kempland*, 2 Bl. 1106, *Wyllie v. Wilkes*, Doug. 519., *ex-parte English*, 2 Bro. 609., *ex-parte Cator*, 1 Bro. 257 & 267.

Temporary  
exemption.

Bankrupts.  
Annuity.

time of the bankruptcy, to prove under such commission as a creditor for the value of the annuity; which value the commissioners shall have power, and are thereby required to ascertain. And the certificate of every bankrupt, under whose commission such proof shall or might have been made, shall be a discharge against all demands whatever in respect of such annuity, and the arrears and future payment thereof in the same manner, as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved under the commission. In the construction of this division of the statute, it has been determined, that the bankruptcy and certificate of one of several grantors of an annuity, who has jointly and severally covenanted for its payment, as well as given a warrant of attorney to confess joint and several judgments, discharges the bankrupt, (s) but does not affect the liability of the other grantors; (t) and in this respect, it seems, there is no distinction between principals and sureties. (u)

Bail.

Prior to the stat. 49 G. 3. c. 121., it had been decided, that if after the bankruptcy of the principal debtor, the amount was paid by the bail, such debt could not

(s) *Baxter v. Nichols*, 4 Taunt. 89. See *Page v. Bussell*, 2 M. & S. 551. *Soutten v. Soutten*, 1 D. & R. 521. 5 B. & A. 852. s. c. *Welsh v. Welsh*, 4 M. & S. 333. *Van Sandau v. Corsbie*, 3 B. & A. 13. *Cowley v. Bussell*, 4 Taunt. 460. *Mence v. Graves*, *ibid.* 854. And 1 Geo. 4. c. 119.

(t) *Baxter v. Nichols*, 4 Taunt. 92. This clause is very defective, for it does not declare what shall be the consequence of the bankruptcy of a grantor with respect to others. It would have been better if the legislature had declared that. Perhaps it might have been as well if they had given the annuitant the option, either to require from the other solvent persons the residue of the ascertained value, or that the annual payment should henceforth be reduced in the same rate as the dividend bears to the whole assessed value. The object of this clause was merely to discharge the bankrupt and his future effects; but the rule which is pronounced, will not prevent the plaintiff from proceeding against the other three, as he might otherwise have done. Per Chambre J.

(u) Per Chambre J., *Baxter v. Nichols*, 4 Taunt. 92.

be proved under a commission issued against the principal; (y) and since the passing of that act, as the word "bail" is not mentioned, and as the condition of a bail-bond or recognizance is in the alternative, either to pay the damages, appear according to the exigencies of the writ, or render the principal, neither bail to the sheriff (z) nor bail above, (a) are to be considered as sureties, "for, or as liable for, the debt of a bankrupt," within the meaning of the statute. So that, unless the bail-bond, (b) or the cognizance of bail, (c) be forfeited before the issuing of the commission against the obligor; the bail are not precluded by the certificate from suing the bankrupt for money expended by them, in consequence of their liability as bail.

Temporary  
exemption.  
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Bankrupts.  
Bail.

A bond given to indemnify a parish against the maintenance of an illegitimate child, does not create a debt proveable under the commission, and the obligor is not discharged by his certificate from expenses incurred subsequent to his bankruptcy. (d) So a promise made by a father to pay a weekly stipend for the support of his illegitimate offspring, is not barred by the certificate, except as to the arrears due at the time of the bankruptcy. (e)

Bastardy  
bond.

The several statutes (f) which in particular cases enable the holders of a bill of exchange to prove under a commission, provide that the bankrupt shall be protected by his

Bills of ex-  
change and  
promissory  
notes.

(y) *Smithson v. Johnson*, Barnes, 113. *Goddard v. Vanderheyden*, 2 Bl. Rep. 794. 3 Wils. 262. s. c. *Donnelly v. Dunn*, 2 B. & P. 45. Sed vide *Banteflour v. Coat*, Cowp. 25. *Cockerill v. Owston*, 1 Burr. 436.

(z) *Hewes v. Mott*, 6 Taunt. 328. 2 Marsh, 192. s. c.

(a) *Newington v. Keeys*, 4 B. & A. 493.

(b) *Bouteflour v. Coat*, Cowp. 25.

(c) *Hockley v. Merry*, 2 Stra. 1043. *Goddard v. Vanderheyden*, 2 Bl. Rep. 794. 3 Wils. 262. s. c.

(d) *Overseers of St. Martin's in the Fields v. Warren*, 1 B. & A. 491. 3 Stark. 138. s. c.

(e) *Millen v. Whittenbury*, 1 Campb. 428.

(f) 7 Geo. 1. st. 1. c. 31. 5 Geo. 2. c. 30.

Temporary  
exemption.

Bankrupts.  
Bills of ex-  
change and  
promissory  
notes.

certificate from all further responsibility. And the statute 49 Geo. 3. c.121. s. 8. having, in various instances, enabled sureties to prove, where they have been compelled to pay the bill or note after the issuing of the commission, has greatly enlarged the effect of the certificate; but as the cases on the subject are exceedingly numerous, it may be expedient merely to refer in the note to the different writers on the bankrupt laws. (g)

The legal liability of parties to bills of exchange, accrues in the country where the bill is drawn, and not where such negotiable security may have been transferred or become payable. Hence, if the cause of action arise abroad by the bill being drawn there, a certificate obtained in that country is a bar to any action instituted in this. (h) But where the bill or note is drawn and payable in England, a certificate abroad will not be any bar to an action in this country, although at the time of making the contract, the bankrupt resided abroad in the country where he afterwards procured his certificate. (i)

Bonds.

Bonds for payment of money on demand, or on a specific day, and not merely at a future uncertain period after the bankruptcy; or when payable by instalments, are, by the statute 7 Geo. 1. c. 31., made proveable, deducting a rebate of interest. (k) But if a bond to replace stock be not forfeited until a day subsequent to

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(g) For the cases on this subject, see 1 Montague's Bt. L. 188—204. 2d edit. 1 Cooke's Bt. L. 189—218. 3d edit. Chitty on Bills, 431—486. 6th Edit.

(h) Potter v. Brown, 5 East, 124. Ballatine v. Golding, Cooke, 575. Macarty v. Barrow, 2 Str. 949. 3 Wils. 17. s. c. See 7 East, 437. n. a. Francis v. Rucker, Amb. 672. But where an accommodation bill had been drawn by defendant in Ireland, and accepted and paid by plaintiff in England, the certificate under an Irish commission of bankruptcy, was held to be no discharge. Lewis v. Owen, 4 B. & A. 654.

(i) Quin v. Keefe, 2 H. Bl. 553. Pedder v. Mac. Master, 8 T. R. 609. Smith v. Buchanan, 1 East, 6. But see Burrows v. Jemino, 2 Stra. 733. Lewis v. Owen, 4 B. & A. 654.

(k) Ex-parte Barker, 9 Ves. 110.

the bankruptcy of the obligor, it is incapable of being proved under the commission. (l) Temporary exemption.

It has already been stated that every legal debt becoming due before the bankruptcy of the debtor, or contracted *bonâ fide* upon a valuable consideration; and to be paid *unconditionally* after the bankruptcy, is proveable under the commission; (m) but that debts payable upon a contingency, or at a future uncertain period, are not barred by the certificate. (n) As where a note is sent to a banker with a letter, stating it to be a security, and to be delivered to the payee upon a stipulated contingency, no debt capable of being proved will accrue until the specified event has happened. (o) But if there be a legal debt, though capable of being afterwards defeated by a particular occurrence, it may be proved under the commission: as where a trader on his marriage gives a bond payable immediately to trustees, to secure a provision to his wife and family in case of his insolvency; the bond being forfeited at law, it may be proved under the commission, upon the ground that there was a legal debt subsisting anterior to the failure. (p) Bankrupts. Contingent demands.

A covenant to pay money (q) at a limited time may be proved, whether the period stipulated has elapsed before or posterior to the bankruptcy. (r) But it has been said, that a Covenants.

(l) *Ex-parte Leitch. Co. Bt. L. 149.*, *ex-parte Day*, 7 Ves. 302., *ex-parte King*, 8 Ves. 334.

(m) *Ex-parte Barker*, 9 Ves. 110., *ex-parte East India Company*, 2 P. Wms. 396., *ex-parte Minet*, 14 Ves. 189., *ex-parte Campbell*, 16 Ves. 244. See 8 Ves. 337.

(n) See ante, page 96.

(o) *Savage v. Aldren*, 2 Stark. 232.

(p) *Staines v. Planck*, 8 T. R. 386. In re *Murphy*, 1 Schoales and Lefroy, 44. 180. *Walcot v. Hall*, 2 Bro. 305. *Ex-parte Groome*, 1 Atk. 114.

(q) But of a covenant to do any other act except to pay money, there cannot be any proof, although the covenant was broken before the bankruptcy. *Banister v. Scott*, 6 T. R. 489.

(r) 7 Geo. 1. st. 1. c. 31. *Charlton v. King*, 4 T. R. 156.



Temporary  
exemption.

Bankrupts.  
Covenants.  
Costs at  
law.

covenant to pay a sum of money upon demand or request, is not proveable, unless a demand or request of payment has been made before the issuing of the commission. (s)

The certificate which discharges the bankrupt from the original debt, operates as a bar to the recovery of costs, whether arising out of the original action, (t) or accruing from a writ of error. (u) But where the sum recovered by the verdict is in the nature of *damages*, and judgment has not been entered up, in such cases it seems the costs cannot be proved, and the bankrupt's liability *continues unaffected*. (x)

(s) *Ex-parte Campbell*, 16 Ves. 248. Sed vide *Rumble v. Ball*, 10 Mod. 38., *ex-parte Beaufoy*, Cooke's Bt. L. 200., *ex-parte Sparling*, Bt. L. 146., *ex-parte Granger*, 10 Ves. 349., *ex-parte Mare*, 8 Ves. 335., *Utterson v. Vernon*, 3 T. R. 539., 4 id. 570., *ex-parte Coming*, 9 Ves. 115.

(t) *Willett v. Pringle*, 2 N. R. 190., *ex-parte Hill*, *ibid.* 191. n. *Lewis v. Piercy*, 1 H. Bl. 29. *Philips v. Brown*, 6 T. R. 282. *Blandford v. Foote*, Cowp. 138.

(u) *Scott v. Ambrose*, 3 M. & S. 326.

(x) The authorities are contradictory. See *ex-parte Todd*, 3 Wils. 270., *ex-parte Hill*, 11 Ves. 646., *Anon.* 1 Atk. 140., *ex-parte Charles*, 14 East, 210., *Waller v. Sherlock*, 3 Wils. 270. Contra, see *Longford v. Ellis*, 1 H. Bl. 29. *Buss v. Gilbert*, 2 M. & S. 70. *Ex-parte Charles*, 14 East, 210., *ex-parte Hill*, 11 Ves. 652., *Walker v. Barnes*, 5 Taunt. 778. Where the plaintiff is nonsuited, (*Ex-parte Todd*, 3 Wils. 270. 11 Ves. 260. *Hurst v. Mead*, 5 T. R. 365. *Watts v. Hurst*, 1 B. & P. 134. *Ex-parte Hill*, 11 Ves. 652. *Walker v. Barnes*, 1 Marsh, 346. 5 Taunt. 778. s. c.) or has a verdict, (*Walker v. Barnes*, 5 Taunt. 778. 1 Marsh. 346. s. c.) and afterwards becomes a bankrupt before judgment, the costs not being proveable under the commission, are not barred by the certificate. In the late case of *Beeston v. White*, 7 Price, 209., the plaintiff had recovered a verdict for damages in an action of tort, which were referred to an arbitrator, who was to make his award before the 4th day of Michaelmas Term; but the arbitrator (the rule being enlarged) did not do so until the 1st of January following, when the plaintiff signed final judgment as of Michaelmas Term. In the interval, the defendant became a bankrupt, and obtained his certificate on the 10th December. Held, that being a debt of record it ought to have been proved under the commission, and that the plaintiff could not sue out execution for the damages and costs. See 1 J. & W. 423. 1 G. & J. 107. Where a bankrupt sued as executor, pleaded a false plea between the issuing of the commission and the obtaining of his certificate; he was holden to be liable to the costs incurred by such plea, *de bonis propriis*. *Howard v. Jemmet*, 3 Burr. 1368. 1 Bl. Rep. 400. s. c.



In the Courts of Equity, costs do not become a debt until taxation. Hence, where an order for costs had been made antecedent to the bankruptcy, but not taxed until after the commission, they were considered not to be proveable (y). So where the costs of a suit in Chancery were directed to be paid by an award made before the bankruptcy of the defendant, but not taxed until after he became a bankrupt; Lord Ellenborough observed, that the practice since the decision of *Ex-parte Sneaps*, (z) had always been in conformity with it, and that no agreement could put the award of an arbitrator higher than the order of the Court of Chancery itself. (a)

Temporary  
exemption.  
Bankrupts.

Cost in  
Chancery.

As the King is not expressly named in the statutes relating to bankrupts, the certificate of a bankrupt will be no discharge from debts due to the Crown. (b)

Crown  
Debts.

Where the demand or cause of action consists in damages, which cannot be assessed, excepting by the intervention of a jury, it cannot be proved under the commission, and the bankrupt will continue liable notwithstanding his certificate. (c) But if a demand in the nature of damages be capable of being ascertained and liquidated, so that the creditor at the time of the bankruptcy, can swear to the amount of the claim intended to be proved, the bankrupt will be exonerated. (d) If a demand is partly liquidated and partly not, creditors

Damages.

(y) *Ex-parte Sneaps*, 1 Cooke, Bank. Laws, 211.

(z) 1 Cooke's Bt. L. 211.

(a) *Rex v. Davies*, 9 East, 320. See *Beeston v. White*, 7 Price, 209.

(b) *Rex v. Pixley*, Bunb. 202. Anon. 1 Atk. 262.

(c) *Goodtitle v. North*, Doug. 584. *Banister v. Scott*, 6 T. R. 489. *Hammond v. Toulman*, 7 T. R. 612. *Ex-parte Charles*, 14 East, 497. *Buss v. Gilbert*, 2 M. & S. 70. *Scott v. Ambrose*, 3 M. & S. 327. *Beeston v. White*, 7 Price, 209.

(d) *Ex-parte Leitch*, Cooke's Bt. L. 149. *Johnson v. Spiller*, Doug. 167. *Ex-parte Day*, 7 Ves. 302. *Wright v. Hunter*, 1 East, 20. *Ex-parte Mumford*, 15 Ves. 289. *Utterson v. Vernon*, 3 T. R. 539. 4 id. 570.

Temporary  
exemption.

Bankrupts.  
Damages.

having a security may apply it; first, to the payment of the former, then to the latter, and prove the residue under the commission (e).

Where a bankrupt is discharged by his certificate from a debt in one species of action, he cannot in general be charged by the creditor for the same debt in another form. Thus, where bankers residing at different places mutually agreed to return each other's notes weekly, together with those of certain other houses; and the deficiency, if any, to be made up by the one in advance drawing a bill in favour of the other, at a certain date; the one in advance is from the receipt of the notes indebted to the other in the excess, which debt is discharged by his subsequent bankruptcy; and an action cannot be maintained to recover damages as for a breach of contract, for having neglected or refused to draw the bill, in conformity with that arrangement. (f) But in some cases, a creditor has an option to waive the right of considering his claim as a debt, and proceed to recover the amount in an action for damages as for a *tort*; and if he adopt the latter, the certificate will be no bar. Thus if a bankrupt, to whom a bill has been delivered to obtain payment of it when due, and to remit the amount to his employer, discount it at a loss before it is due and embezzle the proceeds, his certificate would not be a discharge. (g) So if the bankrupt pledge as his own property, bills merely deposited with him, he will continue liable. (h)

Foreign certificate and debts arising abroad.

The general rule of law is, that what is a discharge of a debt in the country where it was contracted, is a dis-

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(e) *Ex-parte Hunter*, 6 Ves. 94., *ex-parte Havard*, Cooke's Bt. L. 150., *ex-parte Rushforth*, 10 Ves. 409.

(f) *Forster v. Surtees*, 12 East, 605.

(g) *Parker v. Norton*, 6 T. R. 695. *De Tastet v. Sharpe*, 3 Mad. 51.

(h) *Johnson v. Spiller*, Doug. 167. *Cullen*, Bt. L. 113. 391. *De Tastet v. Sharpe*, 3 Mad. 51.

charge of it every where. But as great inconvenience might ensue from fraudulent certificates being obtained in remote countries, before a creditor here could be fully apprized of the proceedings, the courts will not, in general, discharge a defendant out of custody, who is arrested at the suit of a creditor resident here, on the ground that the defendant has become a bankrupt and obtained his certificate abroad. (*k*) But this rule must be understood as applicable only to the practice of discharging the defendant out of custody on mesne process, or entering an *exoneretur* on the bail-piece; for in several recent cases, it has been adjudged, that a certificate procured in a foreign country may be pleaded in bar, and it seems that when that course is adopted, the extent of the discharge, as to the person and estate of the bankrupt, will depend upon the law of the country where the certificate is obtained. (*l*)

Temporary exemption.

Bankrupts. Foreign certificate and debts arising abroad.

As the interest is identified with the principal debt, that which discharges the latter will release the bankrupt from the payment of the former. (*m*)

Interest.

The certificate discharges joint as well as separate

Joint debts.

(*k*) *Quin v. Keefe*, 2 H. Bl. 553. *Hunter v. Potts*, 4 T. R. 185. *Smith v. Buchanan*, 1 East, 6. *Potter v. Brown*, 5 East, 124. 1 Smith, 351. s. c. *Whittingham v. De La Rieu*, 2 Chit. Rep. 53. *Carlier v. Languishe*, id. 55. *Bainfield v. Anderson*, 5 B. Moore, 331. But see *Ballantine v. Golding*, Croke's Bt. L. 575. *Burrows v. Jemino*, 2 Stra. 735. And note, 1 Mont. Bt. L. 382. 2d edit. Anon. 1 Anst. 80.

(*l*) *Ex-parte Burton*, 1 Atk. 255. English certificates discharge Scotch debts, (*Bank of England v. Cathbert*, 1 Rose, 462., *ex-parte Barton*, 1 Atk. 255.) and debts contracted here by consignment from a resident in Demarara, if plaintiff has had regular notice of the commission. *Edwin v. Forbes*, 1 Buck. 57. It has not been decided whether a certificate under a commission in England, will bar a debt contracted in the West Indies. But an opinion given by Lord Talbot, as counsel, has been cited as an authority, that it would not be a bar to an action, as the Laws of England, made since Barbadoes and other plantations were settled, do not extend to them unless they are expressly named. *Beawes*, Lex Merc. 543. *Davis's Bt. L.* 439.

(*m*) *Blandford v. Foote*, Cowp. 138.

Temporary  
exemption.

Bankrupts.  
Joint debts.

Principal  
and surety.

debts; (n) but the certificate of one party does not exonerate other persons jointly liable with the bankrupt. (o)

The doctrine which prevailed anterior to the statute 49 G. 3. c. 121. appears to have been, that a debt for which a person was merely liable as surety, but which was not paid by him until after the bankruptcy of the principal, could not be proved under the commission; and consequently, claims created by such subsequent payment, were not discharged by the certificate. But now, by the 8th section of that act, "if at the time of issuing the commission, any person is surety, or liable for any debt of the bankrupt, such person, if he has paid the debt or any part thereof in discharge of the whole, although he has paid the same after the commission has issued, may stand in the place of the creditor who has proved the debt; and when the creditor has not proved, such surety may prove his debt in respect of such payment, not disturbing the former dividends, although he may have become so liable after the act of bankruptcy: Provided that such person had not, when he became so liable, any notice of any bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment; and the issuing a commission is sufficient notice, although such commission is afterwards superseded." (p)

This clause was adopted both for the benefit of the creditor and the bankrupt, (q) and extends to all cases

(n) *Ex-parte Yale*, 3 P. Wms. 25. *Horsey's case*, *ibid.* 23. *Twiss v. Massey*, 1 Atk. 67. *Witkes v. Strahan*, 2 Stra. 1157. *Howard v. Poole*, Dav. 431. *Grace v. Higham*, Fitz. 281.

(o) 10 Ann. c. 15. s. 3.

(p) The issuing of a commission is not notice in point of law to defeat a payment made without actual knowledge of the bankruptcy, within 1 Jac. 1. c. 15. s. 14. *Sowerby v. Brooks*, 4 B. & A. 523. See *Brookes v. Sowerby*, 2 B. Moore, 55. 8 Taunt. 165. s. c.

(q) *Ex-parte Lloyd*, 1 Rose, 4.

of sureties where relief can be obtained under the commission, although the money be not paid until after it has issued; as where A. and B. partners, agree to dissolve partnership, and B. covenants to indemnify A. against all demands owing from the partnership. B. becomes a bankrupt, and A. is obliged to pay a debt owing from the partnership; he is now entitled to come in under the commission and prove the amount. (r) The statute contemplates equitable as well as legal liabilities; and where the right to the principal debt is barred, the right to damages which are accessory to, and consequential on, that principal debt, are also barred. (s) A certificate, therefore, not only discharges any action at the suit of the surety, for the recovery of money actually paid by him in liquidation of the original demand, but to any action for damages accruing to him, as surety from the bankrupt's not fulfilling his engagement. (t)

Temporary  
exemption.

Bankrupts.  
Principal  
and surety.

But as a surety cannot compel a creditor to come in and prove under the commission, and as no debt is created *quoad* the surety, until he is in a condition to be damnified by the responsibility incident to that character; it has been determined, that a surety in an annuity deed, who is compelled by the annuity creditor after the allowance of the certificate of his principal to pay several sums for arrears due after the issuing of the commission, is not within the stat. 49 Geo. 3. c. 121. s. 8., and he may therefore support an action against the principal for such sums and hold him to bail; (u) and where such a surety had redeemed the annuity subsequent to the bankruptcy, it was holden that he was entitled to maintain an action

(r) Wood v. Dodgson, 2 M. & S. 195. 2 Rose, 47. s. c.

(s) Van Sandau v. Corsbie, 3 B. & A. 19. (t) Id. 13.

(u) Per Bayley, J. in Page v. Bussell, 2 M. & S. 553. Welsh v. Welsh, 4 M. & S. 333.

Temporary  
exemption.

Bankrupts.  
Principal  
and surety.

for the value, against the bankrupt who had obtained his certificate, although the grantee had proved under the commission according to the 17th section of the statute. (x) So, where a surety paid to the original creditor a specific sum in discharge of his personal liability as surety, after the former had proved under the commission; it was adjudged not to be a case within the 49th of Geo. 3. c. 121. s. 8., as that act applies only to instances where the surety has paid the *whole* debt, or a *part* in discharge of the whole, and that under such circumstances the bankruptcy was no bar to the claim of the surety. (y)

A covenant in an indenture between A. and B. (assigning to the former a sum of money payable under articles of agreement, by S. L. to B. by instalments) that in case the said sum, or any instalments thereof, should not be paid to A. at the times and in the manner provided for by the articles; B. would, upon demand, pay to A. the said sum or so much thereof as should not be paid at the times, &c. B. was holden not to be discharged by his certificate, as to any instalments accruing due after the bankruptcy, this not being a matter proveable under the commission, by the 49 Geo. 3. c. 121. (z) And it may not be improper to add, that although a bankrupt himself be discharged under the statute, it is only a personal discharge, and does not conduce to exonerate his sureties or satisfy specific securities. (a) Nothing less than actual payment can discharge the former (b) from their liability.

If the bankrupt after he has obtained his certificate, be

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(x) *Flanagan v. Watkins*, 3 B. & A. 186. 1 G. & J. 199. s. c. See *Van Sandan v. Corsbie*, id. 13.

(y) *Soutten v. Soutten*, 1 D. & R. 521. 5 B. & A. 852. s. c.

(z) *Hoffham v. Foudriner*, 5 M. & S. 21.

(a) *Cowley v. Bussell*, 4 Taunt. 460.

(b) *Inglis v. Macdougall*, 1 B. Moore, 196.

arrested for any debt proveable under the commission, he is entitled to be discharged out of custody, upon application to the court or to a judge at chambers. (c) But this provision must be taken with some qualifications; for the right to be discharged on filing common bail, is not a positive and inflexible privilege, the act only vesting in the courts a discretionary power. It is therefore a sufficient answer to a *summary* application to discharge a bankrupt, that the validity of the certificate is intended to be disputed. (d) Where the debt was upon a bill of exchange, in which the bankrupt described himself as of a place where he had never lived, and the plaintiff had never heard of the commission until after he had commenced his action, the court refused to make an order for the bankrupt's discharge. (e) But in a subsequent case (f) where an attorney had been made a bankrupt and obtained his certificate under the description of "dealer and chapman," although the commission was intended to be disputed on the ground of fraud, and the plaintiff deposed, that under the description in the Gazette, he did not know the person to be the defendant, he was notwithstanding these objections, discharged on filing common bail.

Temporary exemption.

Bankrupts. How discharged from custody if arrested after the certificate.

The mode of proceeding, when a certificate has been obtained under a foreign commission, has been already considered. (g)

Although a promise in consideration of signing a bank-

(c) 5 Geo. 2. c. 30. s. 7.

(d) *Stacey v. Federici*, 2 B. & P. 390. *Robson v. Calze*, 1 Doug. 228. *Hewes v. Mott*, 6 Taunt. 329. 2 Marsh. 192. s. c. *Harmer v. Hagger*, 1 B. & A. 332. *Vincent v. Brady*, 2 H. Bl. 1. *Lister v. Mundell*, 1 B. & P. 427. *Sowley v. Jones*, 2 Bl. Rep. 725. See *Newers v. Coleman*, 1 Buck. 5. (e) *Sowley v. Jones*, 2 Bl. Rep. 725.

(f) *Kemp v. Neville*, 5 B. Moore, 21.

(g) See ante, p. 105. As to the effect of a certificate after judgment, see *Graham v. Benton*, 2 Stra. 1196. *Lister v. Mundell*, 1 B. & P. 427. *Callen v. Meyrick*, 1 T. R. 361. *Ashdowne v. Fisher*, Barnes, 206. 2 Bl. Rep. 725. 2 Vern. 696. *Blackhall v. Combs*, 2 P. Wms. 70.

Temporary  
exemption.

Bankrupts.  
Conse-  
quence of a  
new pro-  
mise.

rupt's certificate is void, (i) yet a new security, without any fresh consideration, given after the certificate, without fraud or imposition on the bankrupt, is valid and effectual. (ii) A promise to pay an antecedent debt, must however be express, distinct, and unequivocal. (k)

But the more immediate object of inquiry is not the general effect of a new promise after a certificate has been obtained, but whether the bankrupt can or cannot be holden to bail? In consequence of the case of *Peers v. Gadderer*, (l) recently decided in the King's Bench, in which the whole of the numerous decisions upon the subject were collected, it appears, that as it would be a question of fact, whether the defendant had made himself liable by virtue of a new promise, the court will not in the interim, allow him to be holden to bail, until that question is decided. (m)

Insolvent  
debtors.

The statute 53 G. 3. c. 102, commonly called Lord Reddesdale's Act (which was amended by the statutes 54 G. 3. c. 23., 56 G. 3. c. 102., and continued by the stat. 59 G. 3. c. 129.), having expired, a more permanent provision for the relief of insolvent debtors in England, was

(i) *Holland v. Palmer*, 1 B. & P. 95.

(ii) *Trueman v. Fenton*, Cowp. 545. *Birch v. Sharland*, 1 T. R. 715. *Cullan*, 386. 1 *Montague*, 586. *Ex-parte Burton*, 1 Atk. 255. *Twiss v. Massey*, 1 Atk. 67. *Alsop v. Brown*, 1 Doug. 192. *Bailey v. Dillon*, 2 Burr. 736. *Cockshott v. Bennett*, 2 T. R. 763. *Williams v. Dyde*, Peake, N. P. C. 99. *Colls v. Levell*, 1 Esp. 282. *Besford v. Saunders*, 2 H. Bl. 116. (k) *Fleming v. Hayne*, 1 Stark, N. P. C. 370.

(l) 2 D. & R. 240. 1 B. & C. 116. s. c.

(m) Authorities, that he ought to be discharged—*Trueman v. Fenton*, 2 Cowp. 544. *Turner v. Schomberg*, 2 Stra, 1233. *Bailey v. Dillon*, 2 Burr. 736. *Wilson v. Kemp*, 3 M. & S. 595. *Mucklow v. St. George*, 4 Taunt. 613. *Kemp v. Neville*, 5 B. Moore, 21. Authorities, that he ought not to be discharged—*Tidd*, 231, 7th edit. *Drew v. Jefferies*, id. n. a. 8 Price, 531. *Best v. Barker*, id. 533. *Hewes v. Mott*, 6 Taunt, 349. 2 Marsh. 192, s. c. *Blackburn v. Ogle*, 8 Price, 526. Some difficulty may however occur in carrying this rule into general practice, because subordinate questions must necessarily arise that may not be considered as concluded by this decision, Does it extend to verbal promises, or to distinct substantive securities?



made under certain restrictions, by the statute 1 G. 4. c. 119. s. 26., which enacts, "that no prisoner who shall have obtained his discharge under the act, shall, at any time after such discharge, be imprisoned by reason of the judgment entered up against him, in the name of the assignee; or of any judgment, decree, or order, obtained for payment of money only, or for debt, damages, contempt of any court, ecclesiastical or civil, by non-payment of money or costs contracted, incurred, occasioned, owing, or growing due, at the commencement of actual custody, and expressed in such discharge, or shall be in prison for any costs, taxed or untaxed, to the payment of which he may be then liable, in consequence of any contempt, or in order to the purging of the same; but that upon every arrest, any judge of the court from which the process issued, may release the insolvent out of custody, and order the party at whose suit he was arrested to pay the costs."

Temporary  
exemption.

Insolvent  
debtors.

Persons discharged under occasional insolvent acts, are not liable to be holden to bail in respect of debts contracted *prior* to the times prescribed in those statutes,<sup>(n)</sup> but they may be arrested upon claims created *after* the periods specified, and before their actual discharge. <sup>(o)</sup>

The provisions respecting fugitives, do not extend to persons who have constantly resided abroad, <sup>(p)</sup> or who have been in a foreign country merely in the course of

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(n) See 22 & 23 Car. 2. c. 20. 2 W. & M. s. 2. c. 15. 11 G. 1. c. 21. 2 G. 2. c. 20. 10 G. 2. c. 26. 37 G. 3. c. 85. 44 G. 3. c. 108. 45 G. 3. c. 3. 49 G. 3. c. 115. 51 G. 3. c. 125. 52 G. 3. c. 165. 53 G. 3. c. 6. 54 G. 3. c. 28. 60 G. 3. c. 4. 1 G. 4. c. 13. A party to a bill or note is discharged from his liability by the operations of an insolvent act. *Sharpe v. Iffgrave*, 3 B. & P. 394. *Lord Kinniard v. Barrow*, 8 T. R. 49. *Lucas v. Winton*, 2 Campb. 443. And it seems that the indorsee of a promissory note, payable three months after date, may be discharged under an insolvent act, which takes place before the expiration of the time limited for its payment. *Workman v. Leake*, Cowp. 22. (o) Cowp. 557. (p) 1 Wils. 85.

Temporary  
exemption.

Insolvent  
debtors.  
Principal  
and surety.

their trade, and not for the purpose of avoiding the im-  
portunities of their creditors. (q) A surety who is com-  
pelled to pay the debt of his principal (a discharged in-  
solvent debtor) after the day mentioned in the act, which  
discharges him, may sue the principal, and hold him to  
bail, as his insolvency and subsequent discharge could  
not be pleaded by the surety against the creditor's de-  
mand. (r) In the principal case on this subject (s) the plain-  
tiff was surety for the defendant for payment of annuity,  
and after the defendant's discharge under the insolvent  
act, 51 Geo. 3. c. 125., was obliged to pay the annuitant,  
in consequence of which he brought an action for money  
paid, &c., to which the defendant pleaded in bar that he  
was in custody on the 1st of May, 1811, and had since  
been discharged under an insolvent act, and that the  
sums paid by plaintiff were paid in respect of an annuity  
granted by him, before the 1st of May. Replication, that  
after the 1st of May, and after the discharge, the plaintiff  
was called upon to pay, and did pay, in respect of such  
annuity, demurrer, and joinder.

Mr. Justice Bayley observed, "Even in the case of a  
bankrupt, if the annuity creditor does not come in and  
prove, but disregarding the bankruptcy, sues the surety,  
the latter cannot insist on the certificate; and if he can-  
not, may he not afterwards resort to the bankrupt? The  
present is a debt accrued since the debtor's discharge,  
and therefore the plaintiff is entitled to judgment."

The subsequent decision of *Welsh v. Welsh* (t) ex-

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(q) Sayer's Rep. 308.

(r) *Page v. Bussell*, 2 M. & S. 551, see *Welsh v. Welsh*, 4 M. & S. 333. *Van Sandau v. Corsbie*, 3 B. & A. 13. *Flanagan v. Watkins*, id. 186. *Mason v. Vere*, 2 Bla. Rep. 1217. *Soutton v. Soutton*, 5 B. & A. 852, 1 D. & R. 521. s.c. (s) *Page v. Bussell*, 2 M. & S. 551.

(t) 4 M. & S. 333, see *Van Sandau v. Corsbie*, 3 B. & A. 13. *Flanagan v. Watkins*, id. 186. *Soutten v. Soutten*, 1 D. & R. 521. s. c. 5 B. & A. 852.

pressly determines the point as to a bankrupt, suggested by Mr. Justice Bayley, as it was there decided, that a surety, in an annuity deed, could not compel the annuitant to come in and prove, under the stat. 49 G. 3. c. 121., but that if he was compelled to pay after the issuing of the commission, he might maintain an action against the bankrupt principal, and the certificate would be no bar.

Temporary  
exemption.

Insolvent  
debtors.  
Principal  
and surety.

This case, therefore, conclusively establishes the right of the surety, under the 1 G. 4. c. 119., to hold his principal to bail, where he has been obliged to pay money, after the insolvent's discharge. (u)

A positive and direct promise to pay the debt after the insolvent's release will revive his liability, (x) but a general indefinite engagement to liquidate the demand by instalments, without specifying the amount, and time of payment, will not render the debtor chargeable. (y) Where the subsequent promise is conditional, the performance of the condition must be complete, before the commencement of the action. (z)

Effect of  
promise af-  
ter dis-  
charge.

The liability of the insolvent to be arrested upon a promise made subsequent to his discharge, to pay an an-

(u) By the 10th section it is provided, that every creditor of any prisoner for any sum payable by annuity or otherwise at any future time or times by virtue of any bond, covenant, or other securities of any nature whatsoever, may be admitted a creditor, and shall be entitled to receive the dividend of the estate of prisoner in such manner and upon such terms and conditions as such creditor would have been entitled unto by the laws now in force, if prisoner had become bankrupt, the amount upon which such dividend shall be calculated, and the terms and conditions upon which the same shall be received, being first settled by the court, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by a creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission.

(x) *Hatt v. Verdier*, 2 Bl. Rep. 724. *Best v. Barber*, 1 Doug. 101.

(y) *Mucklow v. St. George*, 4 Taunt. 613. *Lynbuy v. Weightman*, 5 Esp. 198. *Bailey v. Dillon*, 2 Burr. 736. *Besford v. Saunders*, 2 H. Bl. 116. *Fleming v. Hayne*, 1 Stark, 370.

(z) *Hatt v. Verdier*, 2 Bl. Rep. 724.

Temporary  
exemption.



Insolvent  
debtors.  
Effect of  
promise af-  
ter dis-  
charge.

tecedent debt, has been for a considerable period involved in much doubt and uncertainty, though it is now presumed, that it may be inferred from *Peers v. Gadderer*, (a) that the defendant upon such a promise cannot be holden to bail.

It may perhaps not be superfluous to remark, that neither the sheriff nor his officers are liable to an action of false imprisonment for arresting persons released under

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(a) 1 B. & C. 116. 2 D. & R. 240. s. c. Prior to the determination of this case, it was generally thought (*Horton v. Moggridge*, 6 Taunt. 563. *Blackbourn v. Ogle*, 8 Price, 536. *Drew v. Jefferies*, id. 531. *Best v. Barker*, id. 533.) that an insolvent debtor, by a subsequent promise, not only revived the demand, and rendered himself liable to be sued for its recovery, but created a good and valid debt recoverable at law, by all the ordinary modes of procedure. It being a general rule, that the right to arrest, is concomitant with the right to sue. (*Hesse v. Stevens*, 1 N. R. 134.) As the authorities on this subject are exceedingly at variance, it may not be inexpedient concisely to mention them. In the case of *Wilson v. Kemp*, 3 M. & S. 595, the Court of King's Bench decided, that an insolvent debtor, after his discharge, could not be arrested on a subsequent promise. This rule, it is observable, had been laid down in several prior adjudications, in that, as well as in the other courts. (*Turner v. Schomberg*, 2 Stra. 1233. *Bailey v. Dillon*, 2 Burr. 736. *Lisle v. Jenyns*, Barnes, 81. *Hatt v. Verdier*, 2 Bl. Rep. 724. *Ford v. Chilton*, ib. 799.) The Court of King's Bench in *Wilson v. Kemp* before cited, noticed a position advanced in the 5th edit. of Mr. Tidd's Practice, 207, that insolvent debtors who have been discharged under insolvent acts may be arrested for prior debts on subsequent promises to pay them, citing *Best v. Barker*, 8 Price, 533, as an authority for that rule, where the court refused to set aside an execution against the goods of a person, who, having been discharged under the insolvent debtors act, gave a note to the plaintiff, his creditor, for the part of the debt, which was not paid under the assignment, and Lord Ellenborough distinguished that case as being inapplicable, because it was not a motion to discharge the *person*, but to set aside an execution against the *goods* of the debtor. But it will be seen on reference to that case, as reported by Mr. Price, that Lord Mansfield held, that where the remedy is taken away, and not the debt, the debt may still be the ground of a future promise or security. In the last edition of Mr. Tidd's Practice, it is stated, that an insolvent debtor who has taken the benefit of the 54 Geo. 3. c. 28., is not liable to be arrested on a subsequent promise, and several cases are cited, among others *Wilson v. Kemp*, 3. M & S. 551., omitting altogether that of *Best v. Barker*, 8 Price, 533. It will be seen however, on perusing the judgment of Lord Mansfield, that that decision proceeded on the principle originally asserted by Mr. Tidd, and fully bears him out in the proposition advanced in the former editions of his work.

the insolvent acts for demands due before their discharge. (*b*)

Temporary  
exemption.

Seamen and  
mariners.

To prevent interruption accruing to the naval service, seamen are, under particular circumstances, privileged from being holden to bail. The statutes 1 Geo. 2. c. 14. s. 15. and 31 Geo. 2. c. 10. s. 28., (*c*) enact that “no person who shall serve as a petty officer, or seaman, or be embarked as a non-commissioned officer of marines on board any of His Majesty’s ships or vessels, shall be liable to be taken out of His Majesty’s service, by any process or execution whatsoever, either in Great Britain, Ireland, or any other part of His Majesty’s dominions, other than for some criminal matter, unless such process or execution be for a real debt, which shall have been contracted by such petty officer or seaman, or non-commissioned officer of marines, when he did not belong to any ship or vessel in His Majesty’s service, or other just cause of action; and unless before the taking out of such process or execution, the plaintiff therein, or some other person on his behalf, shall make affidavit before a judge of a court of Record, or other court out of which such process or execution shall issue, or before some person authorized to take affidavits in such court, that, to his knowledge the sum justly due to the plaintiff, from the defendant, in the action, on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, amounts to the value of twenty pounds at the least, and that such debt, so amounting to twenty pounds or upwards, was contracted by the said defendant when he did not belong to any ship in His Majesty’s service. A memorandum of such oath, shall

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(*b*) *Tarleton v. Fisher*, Doug. 675; and see *Sherwood v. Benson*, 4 Taunt. 631.

(*c*) And see 44 Geo. 3. c. 13.

Temporary  
exemption.

Seamen and  
Mariners.

be marked on the back of such process or writ, for which no fee shall be taken. If such seaman &c. shall be arrested, contrary to the provisions of the act, any of the judges of the court out of which the process or execution shall have issued, upon complaint either of the defendant or of one of his superior officers, may examine into the same by the oath of the parties, or otherwise; and by warrant under his hand and seal, may discharge the defendant without payment of any fees, upon due proof that he was belonging to one of His Majesty's vessels, and arrested contrary to the intent of the act; and may also award to the defendant such costs as he shall think reasonable, for the recovery whereof he shall have the like remedy that the person who takes out the said execution, might have had for his costs, or the plaintiff in the said action might have had for the recovery of his costs, in case judgment had been given for him, with costs against the defendant in the said action."

To what  
description  
of seamen  
the statute  
extends.

Armourers, gunners, &c. enlisted as common seamen, are within the provisions of the statute respecting non-commissioned officers: (d) So is every seaman whose name is on the ship's books, notwithstanding he may have absented himself. (e)

Liability of  
bail of  
seamen, &c.

Where a seaman is arrested for a debt of less than 20*l.*, and has given bail, and is afterwards, without any collusion, impressed into His Majesty's service; the bail, by the equity of the stat. 23 Geo. 3. c. 33. s. 22. are entitled to have an *exoneretur* entered, on the bail-piece, if they have not been indemnified: (f) but where bail under

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(d) *Barnsley v. Archer*, Barnes, 114. For a description of *petty* or inferior officers, seamen, and non-commissioned officers of marines, see the stat. 32 Geo. 3. c. 34. s. 58.

(e) *Studwell v. Bunton*, Barnes, 95.

(f) *Robertson v. Patterson*, 3 Smith, 556. 7 East, 405, s. c.

similar circumstances, have permitted the plaintiff to proceed against them to judgment, they will not be relieved; (g) as they are not, after judgment has been obtained, in such a situation that they could, according to the general course of proceeding, (h) discharge themselves by surrendering their principal.

Temporary  
exemption.

Seamen and  
Mariners.  
Liability of  
bail of  
seamen, &c.

The stat. 44 G. 3. c. 13. s. 1. enacts, "That if any seaman, &c. pay the debt for which he has been arrested, give a bail-bond, or be otherwise entitled to be discharged out of custody, the sheriff, &c. in whose custody he shall be, shall not discharge any such seaman, &c. out of his or their custody, either on satisfaction of the debt, or want of prosecution, or upon acquittal of the debt, or want of prosecution, or upon acquittal of the charge upon which such seaman, &c. shall be in custody as aforesaid, or on bail, or by consent, &c., but shall detain every such seaman in his or their custody; and with convenient speed convey, and securely deliver him to the commander-in-chief of some of his Majesty's ships, or to some authorized commissioned officer, &c. nearest to the place where such seaman, &c. shall be, in order that he may be kept to serve on board the fleet as before." (i)

In the annual Mutiny Acts similar regulations are in-

Soldiers, &c.

(g) *Bryan v. Woodward*, 4 Taunt. 557.

(h) *Bond v. Isaac*, 1 Burr. 339.

(i) And s. 4. enacts, "That in case any sheriff, gaoler, or other officer, or officers, shall not securely convey, and deliver any such seamen, &c. to such commander-in-chief, &c., but shall either wilfully, or negligently, permit such seamen, &c. to escape, every such sheriff, gaoler, or other officer or officers shall for every such offence, forfeit 100*l.* to be sued for by action of debt." A common informer may recover the penalty given by this Act against the sheriff, for the misconduct of his *bailiff*, in wilfully suffering a seaman to go at large, who had been taken out of the King's service, by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer. *Sturmy v. Smith*, 11 East, 25. See *Woodgate v. Knatchbull*, 2 T. R. 148. *Pechell v. Layton*, id. 512. *Stanway v. Perry*, 2 B. & P. 157.



Temporary  
exemption.  
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Soldiers, &c.

introduced for the protection of soldiers in His Majesty's service, as the above statutes have afforded to seamen and marines. The stat. 55 G. 3. c. 108. s. 122. (k) enacts, "That no person whatsoever, who is or shall be listed, and enter himself as a volunteer in His Majesty's service as a soldier, shall be liable to be taken out of that service, (l) by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or other just cause of action; and unless, before the taking out of such process or execution (not being for a criminal matter) an affidavit shall be made that the original sum justly due and owing to the plaintiff from the defendant in the action in which such process shall issue, or the original debt for which such execution shall be sued out, amounts to the value of 20*l.* at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded. (m) A memorandum of such oath shall be marked on the back of such process or writ, for which memorandum or oath, no fee shall be taken. And if any person shall nevertheless be arrested, contrary to the intent of this act, it shall and may be lawful, for one or more judges of such court, upon complaint thereof made by the party himself, or by any of his superior officers, to examine into the same, by the oath of

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(k) See 1 G. 2. c. 14. s. 15., 5 G. 2. c. 30. s. 5., 6 G. 2. c. 3. s. 31., 29 G. 2. c. 2. s. 14., 30 Geo. 2. c. 8. s. 20., 32 G. 3. c. 33. s. 22., 32 G. 3. c. 33. s. 22., 32 G. 3. c. 34. s. 8., 37 G. 3. c. 9., 37 G. 3. c. 33. s. 63., 44 G. 3. c. 13., 44 G. 3. c. 54. s. 21., 55 G. 3. c. 17. s. 27., 55 G. 3. c. 108. s. 122., 59 G. 3. c. 9., and 1 & 2 G. 4. c. 9. s. 133. None of these acts extend to *commissioned* officers.

(l) Where process issues against a person within the protection of these acts, the sheriff may return specially that he is privileged. Sheriff of Middlesex's case, 2 *Ld. Raym.* 1246.

(m) Formerly, when the debt did not amount to the sum required by the act, but the accumulation of costs in the course of the proceedings extended it beyond the necessary sum, the defendant might have been arrested in an action on the judgment. *Nichols v. Wilder*, Barnes, 432.



the parties or otherwise, and by warrant under his or their hands and seals, to discharge such soldier, without paying any fee or fees, upon due proof made before him or them that such soldier was legally enlisted and arrested contrary to the intent of this act; and also award to the party so complaining, such costs as such judge or judges shall think reasonable; for the recovery whereof, he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff, in the like action, might have had for the recovery of his costs, in case judgment had been given for him with costs, against the defendant in the said action."

Temporary  
exemption.  
Soldiers, &c.

In the construction of these acts, the courts have universally determined that they are not confined in their operation to common soldiers or troopers, (n) but extend to all non-commissioned or warrant officers, as gunners, (o) serjeants, and drummers. (p) In answer to an objection against the discharge of a gunner, on the ground that he received additional pay beyond the ordinary stipend of a common soldier, and took a particular oath, the court said, "that a gunner is within the description of a common soldier, the extra pay is only a remuneration for the more than ordinary skill, necessary to fulfil the duties of such an appointment." (q) But a drill serjeant in a volunteer corps, though subject to the regulations of the Mutiny Act, according to the stat. 44 Geo. 3. c. 54. s. 21. relating to volunteer courts martial, is not privileged as a regular soldier from being holden to bail in respect of debts contracted under 20l. (r)

To what  
description  
of soldiers  
the statute  
extends.

(n) *Bailey v. Jenners*, 1 Stra. 2.

(o) *Johnson v. Louth*, 1 Stra. 7. 10 Mod. 846. s. c.

(p) ————— 1 Wils. 216. 1 Bl. Rep. 29. s. c.

(q) *Johnson v. Louth*, 1 Stra. 7. 10 Mod. 846. s. c.

(r) *Rickman v. Studwick*, 8 East, 105.

**Temporary  
Exemption.**

**Soldiers, &c.**  
To what  
description  
of soldiers  
the statute  
extends.

**Exemption  
of soldiers  
from arrest  
does not ex-  
tend to  
criminal  
matters.**

**Liability of  
bail of sol-  
diers, &c.**

It cannot be objected against the discharge of a soldier, who has recently enlisted, that he has not commenced his military avocations; the only question the court have to consider is, whether he is or is not a soldier. The fact of his enlistment and receiving pay, are sufficient to invest him with that character. (s)

The protection from arrest, afforded to soldiers under these acts, is confined to *civil actions*. Hence a soldier on whom an order of bastardy has been made, may be committed until he find sureties for payment of the allowance; (t) and on the same principle it has been resolved that a soldier in actual service, is not protected from being committed to prison for want of sureties, under the stat. 6 Geo. 2. c. 12. s. 31. upon an oath charging him to be the father of a child likely to become a burden to the parish. (u)

As the exemption from arrest is not the privilege of the soldier, but the immunity of the public, the bail will not in general be relieved from their liability, where they are in such a situation that they could not, consistently with the practice of the court, discharge themselves by surrendering their principal. (x) Thus where a non-commissioned officer had been arrested, and given bail, the Court of Common Pleas refused, after judgment, recovered against the latter, to set aside the proceedings, and cancel the bail-bond. (y)

Although a person cannot be taken out of his Majesty's service other than for some criminal matter; yet he may be surrendered by his bail in their own discharge. (z)

(s) *Bayley v. Jenners*, 1 Stra. 2.

(t) *Rex v. Archer*, 2 T. R. 270.

(u) *The King v. Bowen*, 5 T. R. 156. Nol. Rep. 186. s. c.

(x) *Robertson v. Paterson*, 7 East, 405. 3 Smith, 556, s. c.

(y) *Bryan v. Woodward*, 4 Taunt. 557.

(z) *Bond v. Isaac*, 1 Burr. 339. See *Horn v. Sirenford*, 1 D. & R. N. P. C. 20.

The statutes 50 Ed. 3. c. 5. & 1 R. 2. c. 15: privilege Temporary  
exemption.  
clergymen from being holden to bail in going to and Clergymen.  
returning from church, and during the performance of  
divine service; but these acts afford no protection where  
the parties claiming it unnecessarily prolong their stay  
in church with a fraudulent design of avoiding legal  
process. (a)

The Toleration Act and subsequent statutes do not merely entitle Protestant dissenters to an exemption from penalties, but afford protection to their religious worship, and to the funds destined for its support. It is therefore conceived, that the privilege created, or rather recognized by 50 Ed. 3. c. 5., extends to those who conduct the religious services of dissenters, and since the 31 Geo. 3. c. 32. to persons officiating at Roman Catholic chapels.

In a book of considerable authority (b) it is laid down as a general proposition, that the arrest of a clergyman, under civil process, whilst engaged in the *bona fide* fulfilment of his clerical duties, is a false imprisonment; but the accuracy of this position appears extremely doubtful, as it is totally irreconcilable with that rule of law which establishes the distinction between the arrest of a person not originally subject to be holden to bail, and of a person who is in general liable, but who is entitled at the time of the process being executed, to some temporary or particular exemption. The arrest of the latter would not be illegal, though the party might be entitled to be discharged on motion. (c) From this rule, it is conceived, that an action of trespass could not be sustained, and that no other species of remedy could be

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(a) 12 Co. 100.

(b) 5 Bac. Ab. 565.

(c) *Tarlton v. Fisher*, Doug. 675. *Parsons v. Lloyd*, 2 Bl. 845.  
3 Wils. 341. s. c.

Temporary  
exemption.

Aliens.

adopted, beyond moving for the party's discharge. (cc) Aliens have, in general, no privilege from arrest, and as the stat. 38 Geo. 3. c. 50. s. 9. (d) which was enacted by the legislature to protect foreigners residing in this kingdom, who had quitted their own country in consequence of the French revolution, has expired, with the causes which originally gave rise to its introduction, it will be unnecessary to examine the cases on the subject.

Insane persons.

There is no prohibition in the law of England against arresting a lunatic. (e) He is amenable to civil process, and subject to the same restrictions, as persons free from mental alienation. (f) The courts have therefore refused to discharge a defendant, on the ground that he was insane at the time of being holden to bail, (g) even although the fact of insanity had been established by a commission of lunacy prior to the arrest. (h) And the same practice obtains where the defendant has become insane subsequent to the period when he was taken into custody. (i) In a late case, where a return to a writ of *latitat* stated, that the defendant was insane, and could not be removed without great danger, and had con-

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(cc) In the principal case on the subject (12 Co. 100, see 9 ib. 66. *Wilson v. Guttery*, 5 Mod. 95. s. c. by the name of *Wilson v. Tucker*, 1 Salk, 78), it is said that the party grieved may have an action upon the statute 50 Ed. 3., for when any thing is prohibited by an act of parliament, although the particular form of action is not specified, yet an action on the case lies upon it as upon the stat. of Marlbridge. See *Cameron v. Lightfoot*, 2 Bl. Rep. 1190. *Tarlton v. Fisher*, Doug. 671. *Anon. Lofft.* 433.

(d) See 41 Geo. 3. c. 106., 42 Geo. 3. c. 92. s. 1., 43 Geo. 3. c. 155. s. 1., 54 Geo. 3. c. 155. s. 1., 55 Geo. 3. c. 54. s. 1. *Sinclair v. Charles Phillipe, Monsieur de France*, 2 B. & P. 363.

(e) See 2 Rol. Ab. 547. pl. 11. 3 Bac. Ab. Idiot, E. Hob. 134.

(f) *Steel v. Alan*, 2 B. & P. 362. *Pillop v. Sexton*, 3 id. 550. *Cock v. Bell*, 13 East, 355. *Kernot v. Norman*, 2 T. R. 390. *Nutt v. Verney*, 4 T. R. 121. *Ibbotson v. Lord Galway*, 6 T. R. 133.

(g) *Nutt v. Verney*, 4 T. R. 121. As to relief in equity, see 6 Ves. 133.

(h) *Steel v. Alan*, 2 B. & P. 362.

(i) *Kernot v. Normain*, 2. T. R. 39.

tinued so until the return of the writ, the Court of King's Bench refused to grant an attachment against the sheriff, and observed, "that as they were in possession of the facts, they would not interfere by attachment, but leave the party to his remedy by action, if he thought he could make any thing of it." (k)

Temporary  
exemption.

Insane per-  
sons.

It seems that infants have no privilege from being holden to bail. The circumstance of the party's being under age, will not induce the courts to discharge him on a mere summary application. Granting indulgencies(l) of this kind, would be in effect trying by affidavit the merits of the question intended to be submitted to the jury.

Infants.

Prior to the passing of the stat. 29 Car. 2. c. 7. s. 6. an arrest being a ministerial and not a judicial act, would have been lawful on a Sunday; (m) but by that act all arrests under civil process, on that day, are prohibited; it enacting "that no person upon the Lord's day, shall serve or execute, or caused to be served or executed, any writ, process, warrant, order, judgment or decree (except in cases of treason, felony, or breach of the peace); (n) and that the service of every such writ, &c. shall be void, and the person or persons, so serving or executing the same, shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ or process."

No arrest  
can be made  
on a Sun-  
day.

It being a matter of public policy that no proceedings of the nature described in this statute should be had on a Sunday, no assent by the party to waive the irregularity will prevent the court from interfering, to set them

(k) *Cavenagh v. Collett*, 4 B. & A. 279., and see *Anderson's bail*, 2 Chit. Rep. 104.

(l) *Madox v. Eden*, 1 B. & P. 480.

(m) *Mackalley's case*, s. c. 9 Co. 66 c. Cro. Jac. 280.

(n) An arrest on a bastardy warrant is not within this exception. *Taylor v. Freeman*, Gloucester Lent Assizes, 1757, cited 2 Selwyn's N. P. 876. 5th ed.

Temporary exemption.

No arrest can be made on a Sunday.

Mode of obtaining discharge of persons arrested on a Sunday.

aside, even after a rule to plead has been given; (o) and the arrest being absolutely void, an action of trespass for false imprisonment may be supported against the sheriff or his officers. (p)

It has been said that the courts will not discharge the party on motion, but leave him to his remedy by action. (q) In *Parker v. More*, (r) Holt, C. J. is reported to have observed, that if the courts would relieve at all by summary interposition, it must be through the medium of an *audita querela*; for whether the arrest was on a Sunday or not, is a fact capable of being traversed. But the other judges determined that the party ought to be relieved on motion, and as the latter opinion is consonant with the modern practice of invariably affording the same relief on a summary application, as was anciently obtained by an *audita querela*, it is presumed that a party arrested under such circumstances would be immediately discharged. (s)

Persons attending a corporate meeting.

A Burgess of a borough, during his attendance at an election of co-burgesses under a summons from the mayor, pursuant to a *mandamus* directed to the aggregate body of the corporation, is not privileged from arrest. (t) Gibbs, C. J. (u) in delivering the judgment of the Court in *Nixon v. Burt*, said, "no case has been alluded to in the argument, which bears the slightest resemblance to the present;—we must therefore decide on principle. The defendant claimed his privilege on the ground that he

(o) *Taylor v. Phillips*, 3 East, 155. See *Roberts v. Monkhouse*, 8 East, 547.

(p) *Wilson v. Tucker*, 1 Salk. 78 s. c. by the name of *Wilson v. Guttery*, 5 Mod. 95. See *Parrot v. Mumford*, 2 Esp. N. P. C. 585.

(q) *Ibid.*

(r) 6 Mod. 95. 3 Salk. 148. s. c. by the name of *Moore's case*, 2 Lord Raym. 1028. s. c.

(s) See *Taylor v. Phillips*, 3 East, 155.

(t) *Nixon v. Burt*, 1 B. Moore, 413.

(u) *Ibid.* 418.

was performing an incumbent duty, prescribed by the terms in the writ of *mandamus*, and that if he had not performed such duty, he would have been liable to personal punishment. It is quite clear, that if no *mandamus* had issued, that the attendance of the defendant at the election, under the circumstances of this case, would not have privileged him from arrest. Elections of this nature are of daily occurrence, and as no instance has been referred to, where a defendant has been considered entitled to the privilege, we think there is no ground for his being discharged." Here too, the election was enforced by virtue of a *mandamus*, not directed to the defendant individually, but to the corporation at large, and was served on the mayor of such corporation as the presiding officer. Although such service is sufficient, still the case would have been widely different, if the *mandamus* had been addressed to, and served personally on the defendant.

Temporary  
exemption.

Persons at-  
tending a  
corporate  
meeting.

### SECTION III.

#### EXEMPTION ON ACCOUNT OF LOCAL PRIVILEGE.

ALTHOUGH many of the grounds of exemption from arrest, as parties to a suit, witnesses, and clergymen, enumerated in the immediately preceding section, may be considered partly of a local and partly of a temporary nature, the present section will be confined to exemptions, founded strictly and exclusively on the local situation of the individuals claiming the privilege, and beyond which limited locality no exemption from arrest can be created for the shortest interval of time.

The respect due to the Sovereign protects parties from arrest whilst actually in his presence (x) or in one of the royal palaces.

In the  
King's pre-  
sence.

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(x) 3 Bl. Com. 289.

Local  
Exemption

In the  
neighbour-  
hood of the  
King's pa-  
lace

Nor can any arrest be made or process executed within a limited district of the royal residence. (*y*)

The boundaries of what is technically denominated the verge of the palace of Westminster, is described by the statute 28 Hen. 8. c. 12. to be from Charing Cross to Westminster Hall; (*z*) but the arrest having being made within the verge of the palace, will not create any ground for discharging the defendant out of custody. The owner of the franchise whose exclusive jurisdiction has been encroached upon, is the party to complain, and the person making the arrest will be amenable to him. (*a*) But where the process issues out of the palace court at Westminster, it may be lawfully executed within the palace, notwithstanding the King is actually resident there, and no leave has been obtained from the Board of Green Cloth. (*b*)

To confer this privilege, it is not necessary that His Majesty should be absolutely or virtually dwelling in the palace at the time of the arrest. In a late case, (*c*) Lord Ellenborough said "The question of the discontinuance of any place as a palace of residence, which had at any time been so used by the Sovereign upon the throne, might involve in its discussion many extremely delicate circumstances. It would not be a very seemly matter of inquiry, whether His Majesty had by any, and by what manifestations of his royal will, indicated a purpose of not returning to any particular palace. So long, however, as the emblems and ensigns of his kingly dignity are preserved in such palace, and the apartments exclusively appropriated to his use, are by

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(*y*) Elderton's case, 3 Salk. 91. s. c. 284. 2 Ld. Raym. 978. s. c. 6 Mod. 73. s. c. Holt, 590. s. c. 28 Hen. 8. c. 12. 3 Bl. Com. 289. 2 Inst. 548. 3 Inst. 140. 4 Inst. 133. 3 T. R. 735. Rex v. Stobbs.

(*z*) 4 Coke, 46.

(*a*) Fitzpatrick v. Kelly, cited 3 T. R. 740. Bartlett v. Hebbes, 5 T. R. 687. Carrett v. Smallpage, 9 East, 341. Sparks v. Spink, 7 Taunt. 311. Batson v. M'Lean, 2 Chit. Rep. 48. 51.

(*b*) Rex v. Stobbs, 3 T. R. 735. See 28 Edw. 1. stat. 3. c. 3.

(*c*) Winter v. Miles, 10 East, 581. s. c. 1 Campb. 475. n.



his immediate servants kept ready and in a fit condition to receive him at any time; whilst others are kept in like manner for the use of his officers; and some are immediately occupied by His Majesty's sons; and no such use made of the rest of the palace as to preclude or materially interrupt His Majesty's return to it whenever he might choose so to do, His Majesty, we think, may be considered as virtually residing there. Had it indeed, distinctly appeared in evidence, that the immediate personal residence of His Majesty was, by means of any occupation of the palace, incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us. And, whenever a case so circumstanced shall occur, the court will not feel itself bound by any thing now laid down, from directing a jury that the exemption in question ought in such a case to be disallowed." So in *Batson v. M'Clean*, (d) an arrest within the Tower was determined to be irregular, as the King's servants (the yeomen) residing there, is sufficient to invest the Tower with the privilege of a royal residence.

Local  
Exemption

In the  
neighbour-  
hood of the  
King's pa-  
lace.

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(d) 2 Chit. Rep. 51. Fifteen yards paved from the gate of the Tower are equally privileged with the Tower itself.

As great inconvenience accrued from indigent persons resorting to a number of pretended privileged places to elude public justice, under the pretence of their having been palaces of the crown, (especially in London and Southwark, such as White Friars, Savoy, Salisbury Court, Ram Alley, Mitre Court, Fuller's Rents, Baldwin's Gardens, Montague Close, or the Minories, Mint Clink, Deadman's Place, within the hamlet of Wapping or Stepney) all these sanctuaries are now abolished, and by the stats. 8 & 9 W. 3. c. 27. s. 15., 9 Geo. 1. c. 28. s. 1., 11 Geo. 1. c. 22. s. 1. "Persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years. And persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting or abusing any officers executing or having executed the same, shall be felons without benefit of clergy."

An arrest may be also lawfully made within the *Liberty of the Rolls*. Freem. Rep. 368. pl. 474.

Local  
Exemption

Courts of  
justice.

Civil process cannot be executed in the King's courts of justice, whilst the judges are sitting there (e), and it has even been considered a contempt to make an arrest in Palace Yard, *sedente curia*. (f)

Church  
and church-  
yards.

Analogous to this exemption, is the prohibition of arrests in church and churchyards, during divine service, which are expressly interdicted by the statutes 50 Ed. 3. c. 5., and 1 R. 2. c. 15. and though the arrest under such circumstances would not be void, (g) it is said, the party might be indicted. (h)

In the  
party's own  
house.

The recognized maxim "that every man's house is his castle," is founded upon the apprehension, that if the outer door was allowed to be broken open, it would expose the house to encroachment and depredation. Hence no man can be forcibly arrested in *his own house* (i) if the outer door be shut. (k) But when the officer in execution of civil process has once gained peaceable possession, this argument is inapplicable; and, he may enter forcibly either through an inner door or a window, (l) even if it be the apartment of a lodger. (m)

Where the  
party is in  
prison.

An actual residence within the walls of a prison, although not by compulsion, exempts the defendant from arrest, and the only mode of proceeding is by lodging a detainer against the party. (n)

(e) 3 Inst. 41. 140. 3 Bl. Com. 289.

(f) Long's case, 2 Mod. 181. Sed vide Bochenham's case, 1 Leo. 107.

(g) Dr. Butler's case, 2 Keb. 777. 2 Bulstr. 72.

(h) Crouther's case, Cro. Eliz. 654. Prinsor's case, Cro. Car. 602. See 29 Car. 2. c. 7.

(i) This privilege is confined to the dwelling-house of the defendant, for if he be in the house of a stranger, the sheriff, after a demand and refusal to execute the process, may break open the outer door. Forts. 319. Semayne's case, 5 Co. 91. Ratcliffe v. Burton, 3 B. & P. 223. Hutchinson v. Birch, 4 Taunt. 619. Cooke v. Birt, 5 Taunt. 765. Johnson v. Leigh, 6 Taunt. 246. (k) Semayne's case, 5 Co. 91. Lee v. Gansell, 1 Cowp. 1. Loft. 375. s. c.

(l) Lloyd v. Sandilands, 8 Taunt. 250. Com. Dig. tit. Distress, A. 3.

(m) Lee v. Gansell, 1 Cowp. 1.

(n) Wilkinson v. Jacques, 3 T.R. 392. Rose v. Christfield, 1 T.R. 591.

## SECTION IV.

## CONSEQUENCES OF HOLDING TO BAIL PRIVILEGED PERSONS.

ALTHOUGH in enumerating the different classes of individuals protected from being holden to bail, and the various circumstances which conduced to create such an immunity, the mode of taking advantage of the privilege was pointed out under its appropriate division; it may, nevertheless, be expedient, in this place, concisely to recapitulate the general principles applicable to the consequences of infringing any of the ordinary exemptions from arrest.

The party arrested, in some cases, has a choice of remedies; a right to be discharged on motion; to punish the party for a contempt; or bring an action for false imprisonment. When the privilege is apparent, manifest, and acknowledged, and the arrest consequently irregular, the court will, in general, discharge the party out of custody, on motion, whether the exemption be of a personal, temporary, or local nature. (o) But when the right to protection from arrest is involved in doubt, the court will not, upon a summary application, discharge the party, but leave him to his remedy by action, or to plead his privilege. The exceptions which occur to this general rule have been noticed in the preceding section, whilst specifying the nature, duration, and effect of each particular ground of exemption.

Party's  
remedy by  
motion.

There are, however, some cases where the privileged parties, when arrested, would not only be relieved upon motion, but the person executing the process,—as in proceeding against a branch of the Royal Family, a

By incurring  
a contempt,  
&c.

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(o) *Bartlett v. Hebbes*, 5 T. R. 686.

Consequences of holding to bail privileged persons.

By incurring a contempt, &c.

peer, or member of the House of Commons,—would incur the liability of being committed for a breach of privilege, by the House of Lords, or House of Commons, according to the source from whence the protection was derived.

It has been seen, that if the sheriff were to arrest an ambassador or his servant, not only the sheriff and his officer, but also the plaintiff at whose suit the process issued, and his attorney, would be subject to fine, imprisonment, and corporal punishment; (p) and it would seem, that a contempt would be incurred by arresting a person to whom the King had extended his prerogative of protection.

In every other case of personal, temporary, or local privilege, the sheriff may execute the writ, without any regard to the privilege of the defendant; and no action for false imprisonment can be maintained against him or his officer, for executing the process. (q)

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## CHAPTER IV.

### OF HOLDING TO BAIL, IN A SECOND SUIT, FOR THE SAME CAUSE OF ACTION.

General rule.

To secure and protect a defendant from being capriciously arrested and vexatiously holden to bail a second time for the same cause of action; and in accordance with the humane maxim, *nemo debet bis vexari pro eadem causa*, it

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(p) See ante, p. 63. 7 Ann. c. 12.

(q) Cameron v. Lightfoot, 2 Bl. Rep. 1190. Tarlton v. Fisher, 2 Doug. 671. Anon. Loft. 433. Sed vide ante, Section 3.

is ordered by a rule of court (a) made at an early period of our judicial practice, "that if a defendant shall be lawfully delivered from an arrest upon any process, he shall not be again arrested at the same time, by virtue of any process at the suit of the same plaintiff; and if any attorney or plaintiff shall offend in the premises, the name of such attorney, shall be struck off the roll; and further, as well the said attorney as the plaintiff in the said process named, shall be respectively punished as to the court shall seem just."

Second  
arrest.

General  
rule.

But this rule is only intended to afford relief, where the party has sustained some personal inconvenience in consequence of bail having been required; hence, where the defendant has not been arrested in the first instance, but merely served with common process, the plaintiff is entitled to hold him to bail in a second action for the same cause. (b) And this mode of procedure may even be adopted before the first action, when commenced by a serviceable writ, has been discontinued; (c) subject, however, to a plea of *autre action pendante* in abatement. (d)

Where the  
first action  
was not  
bailable.

Where the defendant's discharge from custody is occasioned by a circumstance over which the plaintiff could have had no possible control, such as an alteration in the warrant by the sheriff's officer, under which the arrest was made, without the knowledge or concurrence of the plaintiff, the party may be again holden to bail. (e)

Where the  
defendant  
is dis-  
charged in  
conse-  
quence of  
an act over  
which the  
plaintiff has  
no control.

So, where a bond had been given, conditioned for the payment of a sum of money; if a sentence in the Admiralty Court of Antigua should be affirmed on appeal:

(a) R. M. 15 Car. 2. s. 2. K. B.

(b) Bishop v. Powell, 6 T. R. 616. Davison v. Cleworth, 1 Chit. Rep. 275. n. Lee v. Long, Wightw. 72.

(c) Ibid.

(d) Per Lord Ellenborough, C. J., 1 Chit. Rep. 275. n.

(e) Housin v. Barrow, 6 T. R. 218.

Second  
arrest.

Where the  
defendant  
is dis-  
charged in  
conse-  
quence of  
an act over  
which the  
plaintiff has  
no control.

the appeal was dismissed for want of prosecution, in consequence of which the defendant was arrested, and bail put in and perfected; but the appeal being restored upon petition, the proceedings in the former action, were suspended, and the bail discharged; owing, however, to its being again dismissed, and the party's consequent liability on the bond being revived, the defendant was a second time arrested. The court rejected an application to discharge the defendant out of custody under such circumstances, conceiving that the plaintiff was entitled to bring his action, with all the advantages which he formerly possessed, one of which was the power of holding him to bail. (f)

After arrest  
in a foreign  
country.

Although a defendant may have been previously arrested in a foreign country for the same cause, he is still liable to bailable process in England; at least this practice may be adopted where it does not distinctly appear that the plaintiff might have obtained equal benefit and advantage by proceeding abroad as in this kingdom. (g)

After an  
arrest on a  
*ne exeat*  
*regno*.

Upon a similar principle, a defendant may be a second time holden to bail, where the prior arrest has been effected by process issuing from a court where the method of redress is different from that in which the original suit was instituted. As where a writ of *ne exeat regno* had issued against a party who was afterwards arrested for the same debt, on a *capias* out of the Court of Common Pleas, an application to discharge the defendant was refused, and the court said, "that a motion to set aside proceedings in a court of law, on account of a suit pending in equity, was never granted." (h)

(f) Woodmeston v. Scott, 1 N. R. 13.

(g) Maule v. Murray, 7 T. R. 470. Imlay v. Ellefsen, 2 East, 453. Potter v. Brown, 5 East, 124. 1 Smith, 351. s. c. See ante, p. 27.

(h) Musgrave v. Medex, 8 Taunt. 24.

So where B. had been proceeded against by foreign attachment, at the suit of A., and had surrendered, and pleaded in abatement, that the debt was not incurred within the jurisdiction of the mayor's court; and upon the foreign attachment being discontinued, B. was arrested by A., upon process out of the Court of Common Pleas; it was determined that the foreign attachment could not be deemed equivalent to an arrest, so as to entitle B. to be discharged out of custody on entering a common appearance. (i)

Second  
arrest.

Arrest after  
foreign at-  
tachment.

Where the defendant had been arrested and had given two bail-bonds on two separate writs, which had been sued out into different counties, but was almost immediately apprized by the plaintiff, that it originated in a mistake, and that no further proceedings would be taken on the second writ; the court refused to set aside the assignment of the first bail-bond, but ordered that the second writ should be set aside, and that the plaintiff should pay the costs incurred up to the time when he gave the defendant notice that he should abandon his proceedings in the second cause. (k) In a subsequent case, (l) however, on a similar application being made, arising out of analogous facts, the rule was discharged, as not being adapted to the circumstances of the case. The proper course of procedure would have been a motion to enter an *exoneretur* on one of the bail pieces, and not a rule to set aside one of the two writs for irregularity.

Arrest on  
two writs  
in different  
counties.

The circumstance of a former action having been compromised, will not authorize the court to interfere in setting aside the proceedings in an action instituted for

After com-  
promise of  
former  
action.

(i) *Wood v. Thomson*, 1 Marsh, 395. 5 Taunt. 851. s. c. *Bromley v. Peck*, 5 Taunt. 852. n.

(k) *Bullock v. Morris*, 2 Taunt. 67.

(l) *Powell v. Henderson*, 1 Chit. Rep. 392.

Second  
arrest.



After dis-  
continuance  
of former  
action.

the same cause, unless the second arrest appear to have been made purposely to aggrieve and oppress the defendant. (m)

When the plaintiff has erroneously adopted an improper remedy, but has regularly discontinued his proceedings prior to the second arrest, (n) bailable process may be issued a second time against the defendant for the same cause of action. (o) The discontinuance must however, be complete and perfect, and the costs actually taxed and paid: (p) merely tendering the amount of the costs before taxation, will in general be unavailable; (q) though, in one case, where it clearly appeared that the bail in the original action had forsworn themselves, and were in indigent circumstances, the conduct of the plaintiff in holding the defendant to bail, even before he had discontinued his former proceedings, was considered to be regular; for had a different course been pursued, an interval would have been afforded to the defendant, during which, he might have had an opportunity to abscond. (r) But where the plaintiff, disapproving of the bail in the former action, obtained a side-bar rule for leave to discontinue upon payment of costs, and afterwards proceeded to charge the defendant in custody with a declaration in a new action; the court, upon discovering that the circumstance of the bail having justified, had not been disclosed to the clerk of the rules, when application was made to him to mark the declaration for detaining the defendant,

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(m) *Brown v. Davis*, 1 Chit. Rep. 161. See *Forsyth v. Manton*, 5 Mad. Rep. 78.

(n) *Cartwright v. Keeley*, 7 Taunt. 192.

(o) *Bates v. Barry*, 2 Wils. 381. Per *Ld. Ellenborough*, C. J. in *Imlay v. Ellefsen*, 3 East, 312.

(p) *Belifante v. Levy*, 2 Stra. 1209. *Keeling v. Elliott*, Barnes, 399.

(q) *Molling v. Buckholtz*, 3 M. & S. 153. See *Bristow v. Heywood*, 1 Stark. 48. 4 Campb. 213.

(r) *Olmus v. Delany*, 3 Str. 1216.



viewed the concealment as a mere subterfuge; (s) and discharged the side-bar rule for leave to discontinue the second action, which of course rendered the bail, who had justified in the former suit, still liable. So, in a more recent case, where the plaintiff had executed bailable process against a party before the cause of action had arisen, (t) and had afterwards discontinued and paid the costs incurred in consequence of the mistake, and then arrested the defendant *de novo*, after his legal liability had actually accrued; the court allowed common bail to be filed, on the ground that, as the first arrest must be attributed to gross negligence upon the part of the plaintiff, the second arrest was obviously vexatious. Indeed, in most cases of this description, the courts will infer that the second holding to bail is oppressive, unless the contrary be satisfactorily established. (u) It is therefore not only incumbent and necessary on the part of the plaintiff, to shew that he has discontinued the former action on the ground of misconception or mistake, but it should likewise be rendered manifest, that the second process was not issued with an intention of distressing and harassing the defendant.

Second  
arrest.

After dis-  
continuance  
of former  
action.

Where the defendant is superseded through the *laches* of the plaintiff, he cannot afterwards be holden to bail for the same cause of action; (y) and this rule obtains, notwithstanding the second arrest is founded upon a new and distinct security, given to the plaintiff subsequent to

After the  
defendant  
has been  
superseded.

(s) *Belchier v. Gansell*, 4 Bur. 2502. See *Belifante v. Levy*, 2 Str. 1209.

(t) *Wheelwright v. Joseph*, 5 M. & S. 93. See *White v. Gompertz*, 1 D. & R. 556. 5 B. & A. 905. s. c. In the former of these reports, the result of the application is stated to have been, that the rule was made absolute without costs; but in 5 B. & A. 905., it is stated to have been discharged with costs.

(u) *Archer v. Champneys*, 1 B. & B. 289. 3 B. Moore, 607. The courts will in general stay the proceedings when an action is prematurely brought. See *Kerr v. Dick*, 2 Chit. Rep. 11. Cowp. 454. *Swancott v. Westgarth*, 4 East, 75. *Best v. Wilding*, 7 T. R. 4.

(y) *Blandford v. Foot*, Cowp. 72.

Second  
arrest.

After the  
defendant  
has been  
superseded.

the party's discharge. (z) And a different form of action being adopted, will not deprive the defendant of his right of protection, if it be really and substantially for the same cause. (a)

The distinction between a *supersedeas* through *laches* of the plaintiff, and a *discontinuance* in due time, where the action has been improperly commenced or the remedy mistaken, is derived from the circumstance, that in the latter case, the full time of imprisonment is not expired, but in the former, the defendant has been detained in custody, under the first arrest, until the end of the most protracted period limited and prescribed by the law.

After a  
judgment of  
non pros.

The authorities, as to whether a defendant can be holden to bail a second time for the same cause, after he has obtained a judgment of non pros against the plaintiff, appear conflicting and irreconcilable. In *Turton v. Hayes* (b) it is stated, that the defendant under such circumstances ought to be compelled to find special bail, as the plaintiff suffers sufficient punishment in having to pay the costs of the former suit, and therefore ought not to be placed in a worse condition than before; but it is to be observed, that in several anterior and contemporary cases, (c) a different opinion has been expressed; and in a late case, (d) the Court of Common Pleas, after a judgment of non pros had been obtained by the

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(z) *Taylor v. Wasteneys*, 2 Stra. 1218. *Daniel v. Dodd*, 8 East, 334.

(a) *Imlay v. Ellefsen*, 3 East, 309.

(b) 1 Stra. 439.

(c) *Almanson v. Davila*, 1 Lord Raym. 679. s. c. reported by the name of *Almanzor v. Davilack*, 1 Com. Rep. 93. In the former of these reports, it appears, there was a non pros *for want* of a declaration, but in Comyn's Reports, it is stated to have been a nonsuit occasioned by a defect in the declaration.

(d) *Archer v. Champney's*, 1 B. & B. 283. 3 B. Moore, 607. s. c.

defendant, made a rule absolute to cancel the bail-bond; and stated, that they should infer that a second arrest was vexatious, unless the plaintiff, by positive evidence, distinctly repelled that presumption. This decision is consonant with the general rule already stated, that where a defendant is entitled to be discharged through the *laches* of the plaintiff, a second arrest for the same cause of action ought not to be sanctioned. (e)

Second  
arrest.

After the  
defendant  
has been  
superceded.

If the plaintiff has been nonsuited from inability to prove the execution of the instrument on which the action is brought, or to establish other necessary facts in evidence; (f) or on the ground of a variance between the cause of action stated on the record, and that proved at the trial; the defendant may be again holden to bail for the subject matter of the former suit, unless it distinctly appear that the second arrest was vexatious and oppressive. (g)

After non-  
suit for the  
same cause  
of action.

So, after the defendant has pleaded in abatement the non-joinder of other joint contractors, he may be again arrested in an action in which all the parties to the contract are included. (h)

After judg-  
ment on  
plea in  
abatement.

Where the defendant, in consequence of being arrested, gives the creditor a new security for the liquidation of the debt, which proves, after the party's discharge from prison, to be unproductive, it may be properly considered as a nullity, and he may be again holden to bail for the original amount. As, where a defendant had been released out of custody on the faith of a draft for part of the demand, and a promise to pay the residue in a few days,

On a new  
security  
given for the  
same cause  
of action.

(e) See *Imlay v. Ellefsen*, 3 East, 309. *Daniel v. Dodd*, 8 East, 334. *Hall v. Howes*, 2 Stra. 1039.

(f) *Harris v. Roberts*, Barnes, 73.

(g) *Kearney v. King*, 1 Chit. Rep. 273.

(h) *Salisbury v. Whiteall*, H. 43 G. 3. K. B., cited Tidd, 197. 7th ed. See *Wood v. Thomson*. 1 Marsh, 395. 7 Taunt. 851. s. c.

Second  
arrest.

After bank-  
ruptcy of  
plaintiff.

On judg-  
ments in  
general.

it was decided that he might be immediately re-arrested upon the draft being dishonoured. (i)

If the plaintiff become a bankrupt after the commencement of a suit, the assignee, being unconnected with the prior proceedings, may again hold the party to bail, even while the other action is pending. (k) But it appears that where the first suit has been instituted in the name of a bankrupt, but under the direction and concurrence of the assignees, a defendant cannot be arrested at the suit of the latter, for the same cause of action, unless the original proceedings have been formally discontinued, and the costs regularly taxed and paid. (l)

The general practice, as it relates to holding a defendant to bail on judgments, has been noticed in a preceding chapter. (m) It will therefore, be here sufficient to remark, that in an action of debt upon a judgment, whether after verdict, or by default, the defendant cannot be arrested if he were holden to bail in the prior action, even although the bail in that suit have since become insolvent, (n) or the plaintiff has released them by declaring for a different cause of action than that disclosed in the affidavit of debt, or by laying the venue in a different county to that mentioned in the original writ, (o) or the defendant has surrendered in their discharge and obtained a supersedeas. (p) But if he had not been

(i) Puckford v. Maxwell, 6 T. R. 52. See Owenson v. Morse 7 id. 64. Dutton v. Solomonson, 3 B. & P. 582.

(k) Barnes v. Maton, M. 23 Geo. 3. K. B., cited 15 East, 681.

(l) Carter v. Hart, 1 Chit. Rep. 276. In this case the defendant was discharged from custody, subject to the production of an affidavit, that the first action, which was brought in the name of the bankrupt, had been instituted by the authority of the assignees.

(m) Ante, chap. 2. p. 93.

(n) Sayer Rep. 160.

(o) Crutchfield v. Sewords, Barnes, 116. 2 Wils. 93. s. c. Sed vide De La Cour v. Read, 2 H. Bl. 278.

(p) Blandford v. Foot, Cowp. 72. Revel v. Snowden, Prac. Reg. C. P. 77. Chambers v. Robinson, 2 Stra. 782. Hall v. Howes, id. 1039. Pierson v. Goodwin, 1 B. & P. 361. Vide Whalley v. Warton, Barnes, 62.

previously holden to bail, he may be arrested on the judgment, subject to the limitations and restrictions which have been formerly enumerated.

Second  
arrest.

Notwithstanding a writ of error may have been brought, and bail put in and perfected by the plaintiff, a defendant, in the Court of Common Pleas, may be arrested in an action on the judgment, when he has not been holden to bail in the former suit. (q) In *Kendal v. Carey*, (r) there was a similar decision; but from the observations made by Mr. Justice Gould in the latter case, it may be inferred that a different practice prevails in the Court of King's Bench.

On judgment pending a writ of error.

After a judgment in a former suit has been reversed for error, a party may be again legally arrested for the same cause of action. (s)

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## CHAPTER V.

### OF THE AFFIDAVIT TO HOLD TO BAIL,

It has been seen, (a) that by a recent act of parliament, no person can be holden to special bail, where the cause of action does not amount to the sum of 15*l.* or upwards. And that in such cases, an affidavit (b) must be made and duly sworn before some judge of the court, or

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(q) *Weyman v. Weyman*, Barnes, 71. 2 Com. Rep. 556. s. c. by the name of *Wayman v. Wayman*, Prac. Reg. 57. s. c.


(r) 2 Bl. Rep. 768. The reason of this practice is because there never has been bail given in this court. Per Gould, J. *ibid.*

(s) *Cartwright v. Keely*, 7 Taunt. 192.

(a) Vide ante, p. 14.

(b) The usual and ordinary form of the instrument is, that the defendant is justly and truly indebted to the deponent in a specified sum of money, for &c. (stating the nature of the debt or cause of action, with certainty and precision.)

Affidavit to  
hold to  
bail.



commissioner authorized to take affidavits therein, or before the officer issuing the process, or his deputy, and for which shall be paid only one shilling, over and above the stamp duties; and that the sum specified therein shall be endorsed on the back of the process, for which sum so endorsed, the sheriff or other officer shall take bail; and that if process shall issue for 15*l.* or more, without such affidavit and endorsement made, the plaintiff shall not arrest the defendant, but shall proceed as in non-bailable actions. (*b*)

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## SECTION I.

### BY WHOM THE AFFIDAVIT MAY BE MADE.

THE affidavit of the cause of action, rendered necessary by these statutes, may be made by any person, of whatever religion, rank, or country, having the use of his reason, and such religious belief as to feel the obligation of an oath. The other numerous disqualifications which might be urged against the party, if he were produced as a witness in a cause, do not in general render him incompetent to make an affidavit of debt. But, it would however appear, that the circumstance of the deponent having been convicted of an infamous crime, might afford sufficient ground to induce the court to reject the affidavit, (*c*) although


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(*b*) In 12 Geo. 1. c. 29., 5 Geo. 2. c. 27., 21 Geo. 2. c. 3., 19 Geo. 3. c. 70., 51 Geo. 3. c. 124. s. 1., 57 Geo. 3. c. 101.

(*c*) *Nichols v. Dallyhunty*, Barnes, 79. *Prac. Reg.* 49. s. c. *The King v. Davis*, 5 Mod. 74. Holt, 501. s. c. *Walker v. Kearney*, 2 Stra. 1148. Cowp. 3. 2 Wils. 225. To support this objection to the admission of an affidavit, the defendant should be prepared with a copy of the judgment regularly entered upon the verdict of conviction. *Davis v. Carter*, 2 Salk. 461. It was said in the cases of *Davis v. Carter*, 2 Salk. 461. and *Horsley v. Somers*, Barnes, 116. that a party who had been convicted of an infamous crime, should not be stripped of his legal remedy to recover his just debts, and ought therefore to be considered capable of making an affidavit of the cause of action.

it has been decided that when the debt is sworn to by a competent third person, the court will not receive a counter-affidavit, disclosing that the creditor himself was incapable of making the deposition, but will oblige the defendant if he has any tenable defence on that ground, to avail himself of it by plea. (d)

By whom  
made.



As the legislature have, by several acts of parliament (e) dispensed with oaths from Quakers, in civil cases, their affirmation is sufficient to hold a party to bail. (f)

The affidavit is frequently, though not necessarily, made by the creditor himself. (g) It may be made by one of several plaintiffs, (h) or the creditor's wife, clerk, servant, or by any other third (i) person, who can swear positively and unequivocally to the existence of the debt or other cause of action. And whether the principal resides in this or a foreign country, such affidavits would be equally valid; as in either case if the deponent forswear himself, he will incur the liability of being indicted for perjury. (k) Nor does it seem essential or requisite that the connexion between the plaintiff and the party making the affidavit, should appear upon the face of the deposition. (l)

(d) *Nichols v. Dallyhunty*, Barnes, 79. *Prac. Reg.* 49. s. c. *Bland v. Drake*, 1 Chit. Rep. 165.

(e) 7 & 8 W. 3. c. 34., 1 Geo. 1. st. 2. c. 6., 8 Geo. 1. c. 6., 22 Geo. 2. c. 46. ss. 86, 87.

(f) *Cowp.* 382. *Willes*, 292. See *Omichund v. Barker*, 1 Atk. 21. 1 Wils. 84. *Willes*, 534. s. c.

(g) *King v. Lord Turner*, 1 Chit. Rep. 58.

(h) *Swayne v. Crammond*, 4 T. R. 176. See 1 *Ld. Raym.* 380.

(i) 1 Wils. 339. *Pieters v. Luytjes*, 1 B. & P. 1. *King v. Lord Turner*, 1 Chit. Rep. 58. *Brown v. Davies*, id. 161. In *Elliot v. Duggan*, 2 East, 24.

(k) *King v. Lord Turner*, 1 Chit. Rep. 59. See *Knight v. Keyte*, 1 East, 415. as to an affidavit of belief, see post.

(l) *Pieters v. Luytjes*, 1 B. & P. 1. *Andrioni v. Morgan*, 4 Taunt. 230. *Knight v. Keyte*, 1 East, 415. *King v. Lord Turner*, 1 Chit. Rep. 58. *Brown v. Davis*, id. 161. *Bland v. Drake*, id. 165. *Lee v. Selwood*, 9 Price, 322.

## SECTION II.

## GENERAL QUALITIES OF AN AFFIDAVIT.

THE general rules, as applicable to every affidavit to hold to bail, may be comprised under the following divisions:—

1st. The affidavit must be direct and positive in stating the existence of the debt or other cause of action, unless the facts are not within the personal knowledge of the party making the affidavit.

2d. It must be express, certain, and explicit, as to the nature of the cause of action and the means by which such cause of action was created.

3d. It should not only be positive as to the existence of the debt, and explicit in detailing its nature, but it must be intelligible and free from ambiguity.

4th. It must be single, both with regard to the action and the parties.

5th. It must correspond in substance with the process and declaration in the description of the parties, the subject matter of the suit, and the form of action.

1st. The affidavit must be positive.

*The affidavit must be direct and positive in stating the existence of the debt or other cause of action.* This rule has been established as well to enable the party injured by a false deposition, to indict the deponent for perjury, as to guard those who make the affidavit against any misconception of the law.

In some of the older cases, a less rigid regard seems to have been directed to the necessity of the affidavit being positive, than has been required by the more recent



adjudications. In *Moutby v. Richardson* (m) an affidavit "that defendant was indebted to the plaintiff in a named sum, as he computes it," was decided to be sufficiently positive. So in *Long v. Lynch* (n) an affidavit stating "that the sum of 2300*l.* was due and owing to the plaintiff for arrears of rent under a certain lease" was considered correct. But these cases seem to be at variance with the rule that the affidavit should be positive, and inconsistent with the majority of the decisions on the subject. (o) Hence an affidavit stating "that the plaintiff, on, &c. gave the defendant notice to quit on, &c. and that the latter held over, &c. *by reason of which and by force of the statute* an action hath accrued to the plaintiff to demand of the defendant, &c. (double rent)" is not sufficient. (p) On the same principle, where an affidavit to hold to bail stated the circumstances under which a debt accrued, and concluded "*by reason whereof the defendant stands indebted in a certain sum, which he hath refused and still refuses to pay,*" is bad; as the words "*by reason whereof,*" are not a positive allegation but a mere recital. (q) So an affidavit, stating a promise made by the defendant, executor, &c. to pay a legacy of 100*l.* bequeathed by his testatrix, and confessing assets to the amount of 200*l.*, but that the plaintiff not receiving the said sum, caused several applications to be made to the defendant without effect, therefore that the defendant was indebted, &c. was held insufficient, as it did not allege (r) "*that the sum was still due and unpaid,*" for the

General  
qualities of  
an affidavit.

1st. The  
affidavit  
must be  
positive.

(m) 2 Burr. 1032. See vide *Mackenzie v. Mackenzie*, 1 T. R. 716. On the case in 2 Burr. 1032. being quoted in *Polleri v. De Souza*, 4 Taunt. 154., the court said, there must be some gross inaccuracy in the report of that case.

(n) 3 Wils. 154. 2 Bl. Rep. 740. s. c.

(o) See *Pomp v. Ludvigson*, 2 Burr. 655.

(p) *Wheeler v. Copeland*, 5 T. R. 364.

(q) *Powler v. Morton*, 2 B. & P. 48.

(r) *Mackenzie v. Mackenzie*, 1 T. R. 716.

General  
qualities of  
an affidavit.

1st. The  
affidavit,  
must be  
positive.

affidavit might be true, and yet the debt may have been discharged subsequent to the time of the applications having been made.

The affidavit must be perfect in *itself*, and not refer to facts to be ascertained from other collateral sources. (s) Thus, where it was stated that the defendant had borrowed 2000*l.* of the plaintiff on bottomry, “which money was then due and owing to this deponent, by virtue of a certain bond *as thereby might appear* ;” such affidavit was holden to be unavailable, (t) as a separate receipt for part of the sum might have been taken, and upon the face of the bond itself, the whole of the debt would appear unliquidated. So an affidavit that defendant is indebted to deponent in a certain sum, as appears by his books, (u) or by an agreement, bearing date on a particular day, (x) or by an account stated between the parties, (y) or by the master’s *allocatur*, (z) or by a bill delivered to the defendant, (a) have been respectively rejected as insufficient.

Exception  
to the rule  
that the  
affidavit  
must be po-  
sitive, from  
the particu-  
lar situation  
of the par-  
ties.

It has been already observed that, when the party sues in his own right, he must swear positively in the affidavit to those facts that obviously lie within his own knowledge. An averment by the deponent that he *verily believes* that the defendant is indebted to him will be ineffectual, (b) unless from the peculiar circumstances of the case it would be unreasonable to require that the deponent should make a more direct assertion of the existence of the debt. As where the cause of action arose from the non-payment of bills in India, it was considered sufficient

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(s) See 1 Wils. 121. 299. (t) Heathcote v. Goslin, 2 Stra. 1157.  
(u) Walrond v. Fransham, 2 Stra. 1219.  
(x) Jennings v. Martin, 3 Burr. 1447.  
(y) Swarbreck v. Wheeler, Barnes 100.  
(z) Powell v. Portherck, 2 T. R. 55.  
(a) Williams v. Jackson, 3 T. R. 575.  
(b) Pomp v. Ludvigson, 2 Burr. 655. Rios v. Belifante, 2 Stra. 1209. Claphamson v. Bowman, id. 1226. 1 Wils. 231.

for the party to swear that they were not paid to his knowledge and belief, in India or elsewhere; but that they were protested for non-acceptance in India, and were still unpaid. (c)

General  
qualities of  
an affidavit.

1st. The  
affidavit  
must be  
positive.

There are also exceptions to the rule, that the affidavit must be positive, founded upon the particular character or office with which the parties are invested; as where the plaintiff sues in *autre droit*, being executor or administrator, (d) or as the assignee of a bankrupt, (e) or a corporate officer for a debt due to a corporation, (f) or as an agent of a creditor resident in a foreign country; (g) in these cases, the deponent, not having a personal knowledge of the debt, cannot be expected to swear to its existence in terms of absolute assertion; but his belief must be distinctly alleged, and it should appear that it was his own substantive persuasion of the truth of the facts stated, and not a belief drawn from the inspection of books and documents. (h) Hence, in an action by assignees, an affidavit made by a clerk of the bankrupt, stating that the defendant is indebted, "as appears by the bankrupt's books," was holden to be bad, because it did not aver the deponent's *belief* that the debt was due, (i) but if the assignee of a bankrupt swear to

(c) *Hobson v. Campbell*, 1 H. Bl. 245.

(d) *Sheldon v. Baker*, 1 T. R. 87. *Mackenzie v. Mackenzie*, id. 716.

(e) *Tonna v. Edwards*, 4 Burr. 2283. *Barclay v. Hunt*, id. 1992. *Swayne v. Crammond*, 4 T. R. 176.

(f) *Mayor of London v. Dias*, 1 East, 237.

(g) *Cass v. Levy*, 8 T. R. 520. *Knight v. Keyte*, 1 East, 415. *King v. Lord Turner*, 1 Chit. Rep. 58. Where the party making the affidavit swears positively to the different facts, the absence of the creditor from this country need not be alleged, *Knight v. Keyte*, 1 East, 415. Nor need the affidavit disclose the agent's means of knowing the facts sworn to, *Pieters v. Luytjes*, 1 B. & P. 1. *Andrioni v. Morgan*, 4 Taunt. 231. *Lee v. Sellwood*, 9 Price, 323. The above exceptions are not the *ne plus ultra*, other cases standing in *pari ratione*, require the same relaxation of the general practice, and must be governed by similar rules. See *Lee v. Sellwood*, 9 Price, 323.

(h) *Molling v. Buckholtz*, 2 M. & S. 563.

(i) *Lowe v. Farley*, 1 Chit. Rep. 92.

General  
qualities of  
an affidavit.

1st. The  
affidavit  
must be  
positive.

the debt, as appears by the bankrupt's books (*k*), or by his last examination, adding "as the deponent verily believes," it will suffice. In *Rowney v. Dean*, (*l*) the Court of Exchequer determined, that an affidavit by an executor of a debt due to his testator, "as appears from a statement made from the testator's books, by an accountant employed by the deponent," was insufficient. It does not appear from the report, on what particular ground this decision proceeded, but it is simply stated that the plaintiff in his character of executor should be permitted to depose to a debt due to his testator in the most cautious manner. The particular reason for rejecting the affidavit was, probably, that the belief of the deponent seemed rather to be founded upon the result of the accountant's examination of the existence of the debt, than from any personal investigation by the deponent.

The assignee of a bond or other debt, or one of several assignees suing in the name of the original creditor, should swear positively as to all the facts of which he is himself cognizant, and to the best of his belief as to such as are within the knowledge of his principal, (*m*) or co-assignee. (*n*) The affidavit on such a debt, must not leave it open to be inferred that the demand has been satisfied between the interval that has elapsed from the period of granting the assignment to the time of making the affidavit. Such an inference must be repelled, by expressly negating that any thing has been paid to the deponent posterior to the assignment. (*o*) The usual practice, in cases where the action is upon a bond, is for the obligee

(*k*) *Tonna v. Edwards*, 4 Burr. 2283. *Barclay v. Hunt*, id. 1992. *Swayne v. Crammond*, 4 T. R. 176.

(*l*) 1 Price, 402.

(*m*) *Loveland v. Basset*, 1 Wils. 232. *Creswell v. Lovell*, 8 T. R. 418. As to the assignment of *choses in action*, see *Chitty on Bills*, 5—9. 6th ed.

(*n*) *Creswell v. Lovell*, 8 T. R. 418.

(*o*) *Mann v. Sheriff*, 2 B. & P. 355.

and assignee to join in an affidavit, stating the execution and assignment of the instrument, and the amount then due for principal and interest: (p) but the concurrent affidavit of both is not absolutely necessary. (q)

Whenever a person, acting in a delegated or representative capacity, assumes a perfect cognition of the facts, and swears positively to the existence of the debt, the affidavit will not, on that account, be rejected, however improbable it may be, under the circumstances of the case, that he should have a positive knowledge of the things to which he has sworn. (r)

*The affidavit must be express, certain, and explicit, as to the nature of the cause of action, and the means by which such cause of action was created.* For whether or not a party is indebted, is a question of law dependent upon facts. (s) Hence affidavits that the defendant is indebted to the plaintiff in trover, (t) or generally upon promises, (u) or in the sum of 500*l.* and upwards, without shewing how the debt arose, (x) or in so much upon a bond for performance of covenants, (y) or upon a breach of articles, (z) or on a balance of accounts between the parties, (a) are too indefinite. The other numerous cases connected with this subject will be examined, whilst treating of the general qualities of the affidavit in particular actions. It will suffice here to repeat, that the

General  
qualities of  
an affidavit.

1st. The  
affidavit  
must be  
positive.

2d. The  
affidavit  
must be  
express,  
certain, and  
explicit.

(p) *Mann v. Sheriff*, 2 B. & P. 355.

(q) *Byland v. King*, 1 B. Moore, 24. 7 Taunt. 275. s. c.

(r) *Knight v. Keyte*, 1 East, 415. *Byland v. King*, 7 Taunt. 275. 1 B. Moore, 24. s. c. *Lee v. Sellwood*, 9 Price, 323.

(s) *Jacks v. Pemberton*, 5 T. R. 552.

(t) *Hubbard v. Pacheco*, 1 H. Bl. 218. In this case, the court said, that in an affidavit to hold to bail, a word so technical as "trover" ought not to be used.

(u) *Cope v. Cooke*, 2 Doug. 467.


(x) *Cooke v. Dobree*, 1 H. Bl. 10.

(y) ————— Sayer's Rep. 105.

(z) ————— Sayer's Rep. 109.

(a) *Polleri v. De Souza*, 4 Taunt. 154.

General  
qualities of  
an affidavit.



leading principle uniformly and invariably pervading the whole series of decisions, is that the affidavit must explicitly and circumstantially disclose the basis of the demand or subject matter in dispute.

3d. The  
affidavit  
must be  
intelligible.

3dly. *The affidavit should not only be positive as to the existence of the debt, and explicit in detailing its nature, but it must be intelligible and free from ambiguity.* The insertion of superfluous words qualifying a prior positive statement, will sometimes vitiate an affidavit, which is in other respects unobjectionable. As where the affidavit stated “that the defendant is justly indebted in the sum of 5000*l.* for so much money had and received of the deponent, and for which he has not accounted:” it was adjudged that the latter words rendered the antecedent part of the sentence uncertain, and the defendant was accordingly discharged on common bail. (b) But where the words unnecessarily introduced do not vary the sense, or render that indefinite which was before intelligible and absolute, the redundant words will be rejected. Thus if it be stated in an affidavit “that Randle Sutton (the defendant) is indebted to the plaintiff for money paid and laid out to the use of the said Randle Jackson,” it will not vitiate, as the word Jackson was superfluous and unconnected with any former part of the deposition. (c) So where the affidavit contained a positive averment that the defendant was justly and truly indebted to the plaintiff on a judgment recovered in a colonial court, a subsequent allegation that the judgment was still in force, unpaid and unsatisfied, as deponent *verily believed*, does not invalidate the previous averment, as the latter words compose a new sentence, distinct from the preceding and positive statement, that the money was due. (d)

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(b) *Champion v. Gilbert*, 4 Burr. 2127.

(c) *Hughes v. Sutton*, 3 M. & S. 178.

(d) *Bland v. Drake*, 1 Chit. Rep. 165.

4thly. *The affidavit must be single both in regard to the action and the parties.* Where the plaintiff has several distinct claims, that cannot be joined in one suit, consistently with the boundaries prescribed by the law to the various forms of action, there must be a separate affidavit for each demand. Hence, where a defendant had been arrested in an action of *debt* upon a bond, and also for a demand in *assumpsit* upon one affidavit, he was ordered to be discharged on filing common bail in both actions ;(e) as a different practice would be a fraud on the stamp duties, and not unfrequently operate as a vexatious and oppressive mode of proceeding to the defendant.

General  
qualities of  
an affidavit.

4th. The  
affidavit  
must be  
single.

On a similar principle, demands owing to several and distinct persons cannot be included in the same affidavit ; and if improperly joined, the instrument cannot be made available to support proceedings at the suit of one. (f) The rule which prohibits two separate plaintiffs from joining in an affidavit, equally precludes admitting an affidavit that comprises two separate defendants. (g) Where, therefore, it was stated in an affidavit that the maker and indorser of a promissory note were indebted to the holder, it was decided that neither could be holden to bail on that deposition. (h) So in penal actions, where several persons have separately incurred penalties, they cannot be holden to bail on one affidavit, comprising all of them collectively ; (i) as such a practice would impose on each defendant the unnecessary expense of taking copies of those parts of the affidavit relating to offences not individually imputed to him. An affidavit to hold

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(e) *Crooke v. Davis*, 5 Burr. 2690. See *Hussey v. Wilson*, 5 T. R. 254. *The Dean and Chapter of Exeter v. Seagell*, 6 id. 688. *Gilby v. Lockyer*, 1 Doug. 217. *Southcote v. Brathwaite*, cited id. 218. n. *Lewin v. Smith*, 4 East, 589. Anon. 3 Taunt. 469.

(f) *The Dean and Chapter of Exeter v. Seagell*, 6 T. R. 688.

(g) *Gilby v. Lockyer*, 1 Doug. 217. *Holland v. Johnson*, 4 T. R. 695.

(h) *Hussey v. Wilson*, 5 T. R. 254.

(i) *Goodwin v. Parry*, 4 T. R. 577.



General  
qualities of  
an affidavit.

to bail on a penal statute, may, however, include several offences committed by the same defendant. (k)

A deviation from the rule, that the affidavit must be single, is an incurable defect, and is not waived by subsequent steps being taken in the cause ; and the proceedings of the plaintiff will be set aside on motion. (l)

5th. The  
affidavit  
must cor-  
respond  
with the  
process, &c.

5thly. *The affidavit must correspond, in substance, with the process and the declaration, in the description of the parties, subject matter of the suit, and the form of action.* The primary object endeavoured to be attained by this rule, is to establish a visible connexion between the different stages of the proceedings, in order to facilitate a prosecution for perjury, if the affidavit be untrue, and to preclude any opportunity of subterfuge or evasion.

In the  
description  
of the  
parties.

When defendants were holden to bail on an affidavit, describing them as surviving partners, but were charged in the declaration, in their individual capacity, the variance was considered fatal, and the defendant was discharged on common bail. (m) So, a misnomer in the Christian name of the defendant, would entitle him to be released from custody ; as, where in the affidavit the defendant was called Thomas Baker, but in the declaration filed against him, he was designated by the name of

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(k) *Holland v. Bothmar*, 4 T. R. 228. See *King v. Cole*, 6 id. 640.

(l) *Goodwin v. Parry*, 4 T. R. 577. *Hussey v. Wilson*, 5 id. 254. Sed vide *D'Argent v. Vivant*, 1 East, 330., and see *Dalton v. Barnes*, 1 M. & S. 230. in which some doubt has been thrown upon the rule stated in the text. In this case, Mr. Justice Bayley observed, that there was not any instance in which the party, after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail.

(m) *Spalding v. Mure*, 6 T. R. 363. *Attwood v. Rattenbury*, 5 B. Moore, 209. *Christie v. Walker*, 1 Bing. Rep. 68. 206. As to the principal point decided in *Spalding v. Mure*, see *Richard v. Heather*, 1 B. & A. 29. where it was held, that under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff might recover one demand from the defendant individually, and another due from him as a surviving partner. But where a party *sues* as a surviving partner, he must be described as such in the declaration. *Jell v. Douglas*, 4 B. & A. 374.



Charles. (n) But a trifling variance in the names of the parties will not be material, if their identity be not involved in doubt. A difference therefore in spelling the defendant's name, as Rennoll for Rennolls, (o) or misspelling the final syllable, by inserting "rum" instead of "run," (p) will not vitiate the instrument.

General  
qualities of  
an affidavit.

5th. The  
affidavit  
must cor-  
respond  
with the  
process, &c.  
In the  
subject  
matter of  
the suit.

In describing the subject matter of the action, the affidavit should disclose the *whole* of the plaintiff's demands. For where the affidavit stated that the defendant was indebted on a bill of exchange, and a general verdict was given, as well for goods sold as in respect of the bill, it was decided that the plaintiff could not, by combining other causes of action against the principal, transfer the liability of the bail to other claims not included in the affidavit, and for which they had not become responsible. (q) In the case referred to, Dallas, C. J. said, "When we look to what is technical, we find no difference of opinion in the officers or in the court; when we look to the books of practice the text is positive; when we look to the reason of the thing, it is, that if bail are told there is a debt of 167*l.* due on a bill of exchange, they shall not be liable for goods sold and delivered. The bail ought to know the extent of their responsibility." (r)

Where the affidavit to hold to bail was on a bill of exchange for 523*l.* 17*s.* 6*d.* and the declaration described the instrument as a bill of exchange for 523 *livres*, 17 *sous*, and 6 *deniers*, being of the value of 523*l.* 17*s.* 6*d.* sterling, the court considered this to be no variance, because the value of the money, described in the affidavit to hold to

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(n) *Clark v. Baker*, 13 East, 273. *Johnson v. Cooper*, 5 B. Moore, 472., where the party *appears* to the writ by his right name, he waives the irregularity, *Hole v. Finch*, 2 Wils. 393.

(o) ——— *v. Rennolls*, 1 Chit. Rep. 659. n. (p) Anon. id. 660. n.

(q) *Wheelwright v. Jutting*, 7 Taunt. 304. 1 B. Moore, 51. s. c.  
See *Caswell v. Coare*, 2 Taunt. 107. (r) 7 Taunt. 305.

General  
qualities of  
an affidavit.

In the form  
of action.

bail, and that set out in the declaration, were the same in substance and effect. (s)

The cause of action described in the affidavit to hold bail, must be consistent with the remedy intended to be adopted in the declaration. An essential incongruity in this respect will exonerate the bail. A declaration in *trover* on aailable writ in *assumpsit*, is therefore irregular ; (t) and the court will, in general, stay proceedings in an action against the bail, on their recognizance, if the plaintiff did not recover against the principal for the cause of action expressed in the affidavit. (u)

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### SECTION III.

#### GENERAL QUALITIES IN PARTICULAR ACTIONS.

IN the present section, it is proposed to consider the qualities of the affidavit, as applicable to the particular forms of action, and the particular causes which generally constitute the various subjects of litigation. It must, however be remembered, that a strict observance of the general rules stated in the immediately preceding section, and certain formal qualities which will be enumerated in a subsequent part of the work, must be invariably adhered to, to render it a valid deposition.

Civil actions, when considered with reference to the nature of the injury suffered, or of the remedy sought, are commonly divided into actions in form *ex contractu*, and in form *ex delicto*. Under these two appropriate divisions the subordinate classes of particular actions and particular rights are comprised. Consistently with this ar-

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(s) Gould v. Logette, 1 Chit. Rep. 659. (t) Tetherington v. Goulding, 7 T. R. 80. Maberly v. Benton, 5 B. Moore, 183.  
(u) Wheelwright v. Jutting, 7 Taunt. 304. 1 B. Moore, 51. s. c.

rangement, the general qualities of affidavits, in particular actions, will be specified and examined.

General  
qualities in  
particular  
actions.

*In form ex contractu.*

The general qualities of an affidavit in an action of assumpsit, will be investigated under the following divisions :

In assumpsit.

1st. *Affidavit respecting personal property ;*

2d. *Affidavit respecting personal services ;*

3d. *Affidavit respecting monies ;*

4th. *Affidavit respecting special contracts.*

An affidavit to hold to bail for money due on the sale of personal property, must disclose its value, and contain a clear and unequivocal allegation, that it was sold and delivered by the plaintiff to the defendant ; but it need not set out so much of the transaction as will shew that it amounted to a *legal* sale, for the plaintiff takes upon himself to say, that such a sale and delivery was effected, as will constitute a valid cause of action. (x) A mere deposition on oath, stating that defendant is indebted to plaintiff, without describing by whom, to whom, or for whose use the property was sold and delivered, is insufficient. Hence an affidavit only alleging that the defendant is indebted to the plaintiff for goods sold and delivered (not stating by the plaintiff to him the defendant) is bad. So affidavits describing the debt to be for goods sold and appraised to the defendant, without saying by the plaintiff, (y) or by the plaintiff, without saying to the defendant, (z) or for goods sold and delivered *for* the defendant, instead of *to* the defendant ; (a)

1st. Affidavit  
respecting  
personal  
property.  
Goods sold,  
&c.

(x) *Jenkins v. Law*, 1 B. & P. 365.

(y) *Cathrow v. Hagger*, 8 East, 106. *Fenton v. Ellis*, 6 Taunt. 192.  
1 Marsh, 535. s. c. *Taylor v. Forbes*, 11 East, 315.

(z) *Young v. Gatien*, 2 M. & S. 603.

(a) *Bell v. Thrupp*, 2 B. & A. 596., 1 Chit. Rep. 331. s. c.

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
1st. Affidavit  
respecting  
personal  
property.

or for goods bargained and sold, without alleging that they were delivered, (b) have been respectively holden incorrect. An affidavit, stating that the defendant is indebted to the plaintiff for hire of divers carriages of the plaintiff, to and for the use of the defendant, without averring that they were hired of the plaintiff, or by whom they were hired, has been holden sufficient; as the words "hired to the defendant," imply a contract, and are equivalent to saying, "let to hire to the defendant;" and though "hired to the defendant" is not strictly a proper or grammatical expression, it is not so unusual as to warrant the rejection of the affidavit. (c)

2d. Affidavit  
respecting  
personal  
services.

An affidavit to hold the defendant to bail for personal services, must allege that the remuneration is due from the defendant to the plaintiff. A statement, "that the defendant, master or commander of the ship *Olive*, was justly and truly indebted to the plaintiff for the work and labour of the plaintiff, and his workmen and servants, done and performed in and on board the said ship; and for materials found and provided by the plaintiff, and used and applied therein; and also for goods sold and delivered, and money paid, laid out, and expended by the plaintiff, at the special instance and request of the defendant, not stating "for the defendant;" or that the goods were sold "to the defendant," was holden to be defective; for although the cause of action stated in the affidavit, is work done on board the ship, it does not result as a necessary consequence from those premises, that the defendant is indebted as captain, he only being liable upon his express contract; and from the terms of the affidavit, the inference that the

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(b) *Hopkins v. Vaughan*, 12 East, 398.

(c) *Brown v. Garnier*, 6 Taunt. 389. 2 Marsh, 83.

work, &c. may not have been done for a third person is not repelled. (d) But an affidavit, stating "that the defendant was indebted to the plaintiff for wages due to him for his services on board the defendant's ship," was considered sufficient, without an express averment that the debt was due from the defendant. (e) In the latter case, it will be however observed, that it distinctly appeared on the face of the deposition, that the vessel was the property of the party sought to be charged.

General  
qualities in  
particular  
actions.

In form *ex  
contractu*.  
2d. Affidavit  
respecting  
personal  
services.

In the Common Pleas, it has been in several cases determined that an affidavit for work and labour need not aver that the acts of service were performed at the request of the defendant. (f) But from a late decision in the King's Bench, it appears, that a different rule obtains in that Court; (g) the insertion of these words is also consonant with the usual printed forms and general practice.

An affidavit for money lent must contain an allegation that the money was advanced "by the deponent to the defendant, at his request," when such an affidavit stated that the money was lent by the plaintiff to the defendant, for the use of another, and which the defendant promised to repay, or cause to be secured to the plaintiff, it was adjudged defective, because it omitted to state that the money had not been secured according to the agreement. The deponent in this affidavit, swore not only to the existence of the debt, but also to a conclusion of law; and afterwards disclosed premises which did not support that deduction. (h)

3d. Affidavit  
respecting  
money  
For money  
lent.

In an action for money paid, it has been determined not

(d) *Young v. Gatien*, 2 M. & S. 603.

(e) *Symonds v. Andrews*, 5 Taunt. 751. 1 Marsh, 317. s. c. *Bliss v. Atkins*, 1 Marsh, 317. n.

(f) *Bliss v. Atkins*, 5 Taunt. 756. 1 Marsh, 317. n. s. c. *Brown v. Garnier*, 6 Taunt. 389. 2 Marsh, 85. s. c.

(g) *Durnford v. Messiter*, 5 M. & S. 446.

(h) *Jacks v. Pemberton*, 5 T. R. 552.

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
For money  
paid.

Money had  
and re-  
ceived.

essentially necessary for the affidavit to aver that it was expended at the request of the defendant,<sup>(i)</sup> for although in proceeding for the recovery of money lent, money had and received, or for the balance of an account, it is said to be requisite to swear to a request; yet such an allegation is not required in an action for money paid, because the plaintiff may have been obliged to disburse the money to satisfy some legal liability, he had incurred for the defendant. Thus where the plaintiff is surety, he may be compelled to pay the money, even against the express interdiction of his principal.

Where the action is for money had and received, the general rule, that it must be positively averred in the affidavit that the subject matter of the suit moved from the plaintiff to the defendant, seems partially relaxed; as it has been decided, that an affidavit, stating the defendant to be indebted to the plaintiff for money had and received, without alleging that it was received by the defendant, is sufficient. <sup>(k)</sup> The reason assigned for this deviation is, that it could not be said that the defendant was indebted, unless the money had been actually received by him. It is not a mere allegation of a legal consequence, but the statement of a substantive fact.

It would be exceedingly inconvenient to exact, that the plaintiff, in his affidavit, in an action for money had and received, should in every instance be obliged to state that the money was had and received "by the defendant, to the use of the plaintiff at the defendant's request." In

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<sup>(i)</sup> *Eyre v. Hulton*, 5 Taunt. 704. 1 Marsh, 315. s. c. by the name of *Hulton v. Eyre*. See also *Symonds v. Andrews*, id. 751. s. c. 1 Marsh, 317. *Jones v. Evans*, H. T. 1823, MS. *Stokes v. Lewis*, 1 T. R. 20. As to the request necessary to support an action for money paid, *Child v. Morley*, 8 T. R. 610. *Capp v. Topham*, 6 East, 392. s. c. 2 Smith, 443. *Exall v. Partridge*, 8 T. R. 308. *Moore v. Pyshe*, 11 East, 52. *Durnford v. Messiter*, 5 M. & S. 446.

<sup>(k)</sup> *Coppinger v. Beaton*, 8 T. R. 338.

the majority of cases, the allegation in the affidavit, that the money has been received by the defendant to the plaintiff's use, is rather an inference deduced from a particular transaction, and on account of which the plaintiff conceives a debt to have been contracted, than from any specific engagement. (*l*) The opinion that in an action for money had and received, a request need not be alleged in the affidavit, is confirmed by the rule of pleading, which dispenses with such an averment in the declaration (*m*) It has already been seen, that it is a general principle that the affidavit must be express, distinct, and unequivocal, and not uncertain or argumentative. Hence, an affidavit, stating that the defendant is indebted to the deponent for so much money had and received of deponent, and for which he has not accounted, is void. (*n*) So where an affidavit alleged that the defendant was indebted to the plaintiff, "as secretary to the Tontine Society," for money had and received to his use; it was considered invalid for not distinctly stating in what character the plaintiff sued. (*o*)

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
Money had  
and re-  
ceived.

Where interest has accrued due upon money lent and advanced, a general affidavit, stating the amount of such interest, will suffice. But where the claim for interest is derived from a special agreement, the particular nature and terms of the contract must be specifically described in the affidavit; for where it only stated that the defendant was indebted to the plaintiff in a certain sum for interest

For interest.

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(*l*) *Symonds v. Andrews*, 5 Taunt, 751. 1 Marsh, 317, s. c. *Eyre v. Hulton*, 5. Taunt, 703. 1 Marsh, 315. s. c., by the name of *Hulton v. Eyre*. In *Carmichael v. Davis*, H. T. 1823, Mr. Justice Bayley granted a rule, because the affidavit, to hold to bail for money had and received to the plaintiff's use, did not shew a request, MS.

(*m*) 1 Chit. pl. 338. 3d ed. And see form of affidavit, Tidd, Appendix, 92. 5th ed.

(*n*) *Champion v. Gilbert*, 4 Burr. 2126.

(*o*) *Whitchurch v. Whiting*, 3 Anstr. 797.

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
On an ac-  
count stated

money, under an agreement, the averment was considered to be too general. (p)

The affidavit to hold to bail on an account stated, must distinctly shew the amount of the balance, and that the object of the suit is for the recovery of such balance. For where the affidavit alleged "that the defendant was indebted to the deponent in 4720*l.* and upwards, under and by virtue of a certain agreement in writing, bearing date, &c. entered into between him, this deponent, and the said defendant, whereby he, the said defendant, undertook and engaged, that he, together with A. B., should pay and discharge on or before, &c. the balance of all subsisting accounts between them, which said balance is *still due and unpaid* to the deponent;" it was holden to be defective and inaccurate, as it left the amount of the balance to be inferred, instead of the allegation of that fact being positive and certain. (q) So an affidavit, stating "that the defendant was indebted to the plaintiff in 1500*l.* for money laid out and expended by the deponent for the said defendant, and upon the balance of accounts," is not sustainable, because it did not specify how much was due upon the balance of accounts, or of what the balance consisted, or whether it had been liquidated by the defendant. (r) Although it had been suggested (s)

(p) *Brook v. Trist*, 10 East, 358. See *Calton v. Bragg*, 15 East, 223. *Walker v. Constable*, 1 B. & P. 306.; that interest is not recoverable, upon demands for, money lent, money had and received and money paid, without a contract for the payment of it either express or implied.

(q) *Hatfeild v. Linguard*, 6 T. R. 217.

(r) *Eicke v. Evans*, 2 Chit. Rep. 15.

(s) In *Jones v. Evans*, K. B. H. T. 1823, MS. where the question was, whether the affidavit should state a request in an action for money paid; the court said, that in the other cases respecting "money had and received, and an account stated," it is necessary to swear to a request. And Mr. Justice Holroyd, in the same term, granted a rule nisi, because the affidavit on an account stated, had not alleged a request. MS.



that an affidavit to hold to bail upon an account stated must allege a request; it is with deference conceived that the propriety of that opinion would not be sanctioned, if the question were brought directly before the court, as it is inconsistent with the rules of pleading, and the nature of the transactions from which such claims usually originate.

General  
qualities in  
particular  
actions.

In form *ex*  
*contractu*.  
On an ac-  
count stated

The affidavit on a special agreement must explicitly disclose the nature of the contract, the consideration, moving from the plaintiff to the defendant, the extent of the party's obligation, and his subsequent breach.<sup>(t)</sup> An affidavit, in which it is simply stated that the defendant is indebted to the deponent in a particular sum, as appears by an agreement bearing date, &c. is not sufficiently positive,<sup>(u)</sup> or that the defendant is indebted to the plaintiff in so much money for interest, under and by virtue of an agreement under the hand of the defendant.<sup>(x)</sup> So, where it was alleged in an affidavit, that the defendant was indebted to the plaintiff in 245*l.* for money lent by the plaintiff to the defendant for the use of a third person, and for which the defendant promised to be accountable and repay, or cause to be secured to the plaintiff, &c. the defendant was discharged on common bail, it not being negatived that the money had not been secured pursuant to the agreement. <sup>(y)</sup> It has been before observed <sup>(z)</sup> that there is a distinction between an arrest for stipulated damages, and one for a penalty; and that in respect of the latter, the party cannot be holden to bail.

4th. Affida-  
vit respect-  
ing special  
contracts.

(*t*) Macpherson v. Lovie, 6 B. & A. 108. 2 D. & R. 69. s. c.

(*u*) Jennings v. Martin, 3 Burr. 1447. Bright v. Purrier, id. 1687. Waters v. Joyce, 1 D. & R. 150.

(*x*) Brooke v. Trist, 10 East. 358.

(*y*) Jacks v. Pemberton, 5 T. R. 552. Fowler v. Morton, 2 B. & P. 48.

(*z*) Ante, p. 24—25.

General  
qualities in  
particular  
actions:

In form ex  
contractu.  
4th. Affida-  
vit respect-  
ing special  
contracts.

The affidavit in an action for the recovery of the stipulated damages incurred by the non-performance of an agreement, must disclose the nature of the contract a breach, and that the forfeiture is not in the nature of a penalty. (a) A statement that the defendant is indebted to the plaintiff in the sum of 50*l.* under a certain agreement in writing, dated, &c. between the plaintiff and the defendant, by which the plaintiff agreed to forfeit the sum of 50*l.* without specifying in what manner the contract was infringed, is too general. (b) So, if a tenant bind himself in a penalty of 100*l.* for performance of repairs within a certain period, the court will not permit him to be holden to bail for the penalty, upon an affidavit, which does not shew in what respect, and to what amount he has failed in the fulfilment of his contract, it not appearing on the face of the affidavit to be a case of stipulated damages. (c)

Bill of ex-  
change, &c.

Bills of exchange and promissory notes being one of the most important and prominent divisions of the action of special assumpsit, it may be desirable to examine more minutely the requisite qualities of affidavits applicable to these instruments. 1st. The affidavit should disclose the amount for which the bill or note was given or negotiated, and the description should, in other respects, correspond with the bill or note. 2dly. That the party suing has an interest in the note or bill as payee, indorsee, or some other character. 3dly. That the defendant has become a party to the note or bill, and has not performed his contract. The instrument must not only be accurately described in terms, but must be stated according to its

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(a) *Archer v. Ellard*, Sayer, 109. *Stinton v. Hughes*, 6 T. R. 13. *Willey v. Thornton*, 2 East, 409.

(b) *Willey v. Thornton*, 2 East, 409. *Macpherson v. Lovie*, 6 B. & A. 108. 2 D. & R. 69. s. c. (c) *Edwards v. Williams*, 5 Taunt. 247.

legal effect. For where an affidavit purported to be made by an indorsee against the acceptor of a bill of exchange for 553*l.* 12*s.*, and it afterwards appeared by the declaration, that the money was not payable generally, but out of a particular fund : the court discharged the defendant on entering a common appearance. (cc)

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
Bills of ex-  
change, &c.

The plain-  
tiff's inte-  
rest in the  
bill.

It is the usual and preferable mode, though *not absolutely essential*, for the affidavit to specify in what particular character the debt is due to the plaintiff, whether he claims as drawer, payee, or indorsee; (d) and although it was once decided otherwise in the Court of Common Pleas, (e) yet it has been since observed, that that decision took place without the case of *Bradshaw v. Saddington* having been cited, and from the latest case on the subject, the practice of the two courts appears now to be uniform. (f)

There is, however, a distinction between stating the plaintiff's title to the bill or note, and the defendant's liability. The character in which the latter became a party to the instrument, must be clearly and distinctly shewn ; for otherwise he might only be liable on the bill, in the character of a guarantee, instead of a party to a negotiable instrument, in which case, the nature of his engagement ought to be differently and appropriately described. (g) Hence the affidavit must *invariably disclose* in what character the defendant is a party to the bill or note, whether as drawer or maker, acceptor or indorser. An affidavit alleging that the defendant was indebted to the plaintiff in the sum of 95*l.* as the indorsee of a certain bill of exchange, drawn by one T. Winslow, without stating how the defendant became liable, whether as acceptor

How the  
defendant  
became a  
party to  
the bill,

(cc) *Wilks v. Adcock*, 8 T. R. 27. *Elstone v. Mortlake*, 1 Chit. Rep. 648.  
(d) *Bradshaw v. Saddington*, 7 East, 94. *Lamb v. Newcomb*, 2 B. & B. 343.  
(e) *Balbi v. Batley*, 1 Marsh, 424. 6 Taunt, 25, s. c.  
(f) *Machu v. Fraser*, 7 Taunt. 171. *Warmesley v. Macey*, 2 B. & B. 338;  
(g) *Humphries v. Winslow*, 6 Taunt. 531. 2 Marsh, 231, s. c.

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
The affida-  
vit must  
shew that  
the bill, &c.  
is due.

or indorser, was considered defective. (h) The term indorsee is descriptive of the plaintiff's interest in the bill, and not of the relative situation of the defendant. (i)

In an action against the maker of a promissory note, or the acceptor of a bill of exchange, it is necessary to state in the affidavit that it was due, or at least to shew the date, and when it was made payable, for otherwise a bill or note being *debitum in præsenti solvendum in futuro*, the affidavit that these parties were indebted might be true, and yet the time for the payment of the note or bill might be unexpired at the time of swearing the affidavit. (k) In an action, however, against the indorser of a bill or note, whose liability is only collateral and conditional, and does not enure until it has been dishonoured by the acceptor or drawer, it has been determined not to be necessary to shew that the bill or note is over due; this case is distinguishable from the former, on the ground that the party being described as an indorser, and as such, only a collateral security, could not be indebted, unless the bill had become due and had been dishonoured. (l) In an action against the drawer, an averment that the bill is due is indispensable. (ll)

Initials of  
the defend-  
ant's Chris-  
tian name  
not suffi-  
cient.

Formerly, where a party to a bill of exchange had only subscribed the initials of his Christian name, and all possible inquiries had been made to ascertain it, without effect, it was holden, that the affidavit and proceedings were sufficient, and the court refused to discharge him on

(h) *Humphries v. Winslow*, 6 Taunt. 531. 2 Marsh, 231. s. c.

(i) See *Machu v. Fraser*, 7 Taunt. 172.

(k) *Jackson v. Yate*, 2 M. & S. 149. See *Holcombe v. Lambkin*, id. 475., and *Edwards v. Dick*, 3 B. & A. 495. *Machu v. Fraser*, 7 Taunt. 171. *Sands v. Graham*, 4 B. Moore, 18. *Warmsley v. Macey*, 2 B. Moore, 53. 3 B. & B. 338. s. c. *Elstone v. Mortlake*, 1 Chit. Rep. 648. *Lamb v. Newcombe*, 5 B. Moore, 14. 2 B. & B. 343.

(l) *Jackson v. Yate*, 2 M. & S. 149. *Davison v. March*, 1 New Rep. 157. *Holcombe v. Lambkin*, 2 M. & S. 475. *Brookes v. Clark*, 2 D. & R. 148.

(ll) *Edward v. Dick*, 3 B. & A. 494.

common bail.<sup>(m)</sup> But in a recent case this doctrine was overruled, and it was decided that an arrest of a party described in a *testatum special capias*, and in the affidavit, by the initials of his Christian name, was irregular. <sup>(n)</sup>

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
In covenant.

The affidavit to hold to bail in an action of covenant, should set out in precise and unambiguous terms the date of the deed, the names of the contracting parties, the substance of the particular covenant, and that the money therein specified to be paid is due. It has already been shewn on what covenants the right to the security of bail may be obtained. <sup>(o)</sup> The affidavit must also disclose, that the amount payable under the covenant is a liquidated sum, and not general indefinite damages.

As the action of debt is a remedy applicable to the recovery of money due upon simple contracts, as well as upon contracts under seal, many of the rules to be attended to in framing the affidavit in an action of assumpsit, apply equally to this division of our subject. It will therefore be only necessary here to advert to the cases which have occurred relative to instruments under seal.

In debt.

The affidavit, in debt on a money bond, should describe the date, the parties, the amount of the penalty, and sum mentioned in the condition. Though this is the ordinary and most accurate mode of proceeding, an affidavit, stating that the defendant is justly indebted to the plaintiff in a sum for principal and interest, due on a bond made by the defendant to the plaintiff, in a greater penal sum, has been holden good, without shewing that the condition of the bond was for the payment of money; for unless it had been so conditioned, the defendant could not be in-

On a money  
bond.

(m) Howell v. Coleman, 2 B. & P. 466.

(n) Reynolds v. Hankins, 4 B. & A. 536. M'Beath v. Chatterley, 2 D. & R. 237. Parker v. Bent, 2 D. & R. 73. See Tomlin v. Preston, 1 Chit. Rep. 397.

(o) See ante, p. 29.

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
On money  
bond.

debted on the bond for principal and interest. (p) But where the amount sought to be recovered, is not described as principal and interest, and the affidavit only contains a general allegation, that the defendant is indebted in 6,000*l.* upon a bond, in the penal sum of 25,000*l.* it is insufficient; for though using the term penal sum, imports that the bond was subject to a condition, it might be a condition for the performance of covenants, when it would be requisite to assign breaches, and shew to what extent the plaintiff was damnified. (q) If from an affidavit to hold to bail, which sets forth the condition of a bond, it appears that the event on which the money was to become payable has not happened, it is unavailable. In *Hobson v. Campbell*, (r) a bond had been given, conditioned for the payment of bills of exchange drawn on A. residing in India, in case such bills should be returned to England, protested for *non payment*. The affidavit, to hold the obligor to bail, after stating, "That he was indebted to the deponent in a certain sum," set out the condition of the bond, and then followed these words, "and that the said bills were not paid to his knowledge or belief in India or elsewhere, but that they were protested for *non acceptance* in India, and were still unpaid." Although the former part of this affidavit was sufficiently positive, yet it became uncertain and defective by being connected with the latter part, from which it did not appear that the bill had been protested for non-payment.

On a bond  
for the per-  
formance of  
an award.

On a bond conditioned for the performance of an award, it is not sufficient to state in the affidavit that the defendant is indebted on a bond generally, but the condition of the instrument must be set forth, and if the action be instituted against a surety for the performance of an award

(p) *Byland v. King*, 1 B. Moore, 24. 7 Taunt. 275. s. c.

(q) *Bosanquet v. Fillis*, 4 M. & S. 330.

(r) 1 H. Bl. 245.

by the principal, it must shew a cause of action against the latter, and that the terms of the award have been fulfilled on the part of the plaintiff. (s) Where the debt arises upon an Irish judgment, the affidavit to hold to bail must shew the value of the money in English currency. (ss)

General  
qualities in  
particular  
actions.

In form ex  
contractu.

On penal  
statutes.

When an offence against a penal statute is bailable, the affidavit should specify the nature of the transgression, and that a forfeiture has been incurred; but a circumstantial description of the act, which constituted the alleged infraction of the law, is unnecessary. (t) Nor is it requisite to state that the party charged with having incurred the penalty, is indebted to the plaintiff, or that such debt is still due. It would be unreasonable to compel the plaintiff to swear that it was a debt owing to him, when any other informer might have previously commenced an action against the same defendant; and as no person is entitled to a penalty, until the process is actually sued out, it is not a debt due to the plaintiff at the time of making the affidavit, nor does in reality any debt accrue to him before judgment has been obtained. (u) Notwithstanding the affidavit on a penal statute need not recite the act creating the offence; yet if it professes to do so, and mis-describes or mis-recites the statute it will be a fatal objection, as the unnecessary matter cannot be rejected as surplusage. (x)

In an action for double rent, under 11 G. 2. c. 19. s. 18. where the affidavit stated "That the plaintiff, on, &c. gave the defendant notice to quit on a particular day, and that the latter held over, &c. by reason of which, and by force of the statute, an action had accrued to the plaintiff, to demand of the defendant double rent;" it was

On 11 G. 2.  
c. 19. for  
double rent.

(s) *Armstrong v. Stratton*, 7 Taunt. 405. 1 B. Moore, 110, s. c.

(ss) *Stone v. Ball*, 2 Chit. Rep. 16. See *Kearney v. King*, 2 B. & A. 301. 1 Chit. 28. 273.

(t) *Davis v. Mazzinghi*, 1 T. R. 705. *Watson v. Shaw*, 2 id. 654.

(u) *Davis v. Mazzinghi*, 1 T. R. 705. (x) *Watson v. Shaw*, 2 id. 654.

General  
qualities in  
particular  
actions.

In form ex  
contractu.  
On the  
lottery act.

held argumentative and defective, because it did not state positively that the defendant was indebted to the plaintiff in a certain sum. (y)

An affidavit on the lottery act (z) must specify the nature of the offence, and aver that the defendant has incurred the forfeiture, though it is not necessary to describe with any minuteness of detail the particular acts which constitute the offence. (a) Therefore an affidavit, containing an allegation, that the defendant insured, or caused to be insured, is sufficient, and the use of the disjunctive, *or*, instead of the conjunction, *and*, will not vitiate. (b) Nor is it essential that it should disclose the sums, or persons, from whom they were received: (c) stating generally, "that the defendant received divers sums, and in consideration thereof, promised to repay other sums," would seem to be sufficiently circumstantial. (d)

It has been said, that it should appear in the affidavit that the plaintiff was authorized to bring the action; as the 38th section enacts, "That no person shall commence any action, &c. for the recovery of any penalty inflicted by any of the laws concerning lotteries, or by that act, unless the same be commenced in the name of His Majesty's Attorney General, or in the name of some officer appointed by the commissioners of the stamp duties; and if any action shall be commenced in any other person's name, the same, and all the proceedings thereon had, are thereby declared null and void; and the court where such proceedings shall be so commenced shall cause the same to be destroyed:" but this objection can scarcely be considered

(y) *Wheeler v. Copeland*, 5 T. R. 364.

(z) 27 G. 3. c. 1.

(a) *Davis v. Mazzinghi*, 1 T. R. 705; *Watson v. Shaw*, 2 T. R. 654.

(b) *Pritchett v. Cross*, 2 H. Bl. 17.

(c) *Rex v. Decker*, 3 Anstr. 862. See *King v. Cole*, 6 T. R. 640.

(d) *King v. Cole*, 6 T. R. 641.



as well founded, as the court will not intend that the plaintiff had no right to institute the action ; for, if in fact he was not authorized to sue, such incapacity should be established by counter-depositions on the part of the defendant. (e)

General  
qualities in  
particular  
actions.

In form *ex*  
*contractu*.

An affidavit of debt on the stat. 26 G. 2. c. 21. for the forfeiture incurred by having unsealed wrought silks in defendant's custody, stating that plaintiff has cause of action against the defendant for 200*l.* forfeited by him for so much unsealed silk, &c. establishes with sufficient certainty, that an offence against the statute has been committed. (f)

On 26 G. 2.  
c. 21. s. 3.  
relative to  
unwrought  
silks.

*In form ex delicto.*

It has been shewn in a preceding section, (g) that in cases where the damages are uncertain, the party cannot be holden to bail without the preliminary sanction of a judge's order. To obtain this permission, an affidavit must be made, disclosing in clear and intelligible language the circumstances which gave rise to the subject of complaint and the damage resulting from it. It is sufficient if the real facts be conveyed to the judge, with sufficient distinctness to enable him in the exercise of his discretion, to collect that the plaintiff has been damnified to a particular amount, though the affidavit might possibly have been framed in more formal, distinct, and specific terms. (h) Hence, an affidavit stating " that the defendant was indebted to the plaintiff in a certain sum, being the value of goods (specifying them) delivered by the plaintiff, or on his account, to the defendant, to be by him carried and delivered to J. W. for the use and on the account of

General  
rule.

(e) *King v. Cole*, 6 T. R. 641.

(g) *Ante*, p. 37.

(f) *Rex v. Rebord*, 3 Burr. 1569.

(h) *Imlay v. Ellefsen*, 2 East, 453.

General  
qualities in  
particular  
actions.

In form ex  
delicto.

For personal  
injuries.

plaintiff," is sufficient; for although the term "indebted" is improperly used, yet it appears that the plaintiff has been injured to the amount sworn to, and also that he has an interest in the property from its having been alleged that they were to be delivered for his use. (i)

Where the action is brought for personal injuries, it is usual to suggest that the deponent believes the defendant to be in circumstances sufficiently affluent to enable him to make the plaintiff a pecuniary recompense, and that he has been informed and believes that the defendant purposes leaving the kingdom. But as the exercise of the power to issue an order for holding the party to bail, is entirely discretionary with the judge to whom the application is made; these suggestions, although generally introduced, are not indispensable. Extreme caution before granting an order is usually manifested by the judges, and the affidavit will be scrupulously and rigorously examined before it will be acted upon. (k)

In trover.

Anterior to a late rule of court, (l) it was sufficient in an action of detinue or trover, for the affidavit to contain a general statement that the defendant had possessed himself of divers goods and chattels of the plaintiff, of a certain specified value, which he had refused to deliver to the plaintiff, and had converted the same to his own use. (m) But even at that period an affidavit, stating that the defendant had converted and disposed of divers goods of the plaintiff's, of the value of 250*l.*, which he had refused to deliver, though the plaintiff had demanded the same and that neither the defendant nor any person on his behalf, had offered to pay the plaintiff the 250*l.* or the

(i) *Imlay v. Ellefsen*, 2 East, 453. *Omealy v. Newell*, 8 East, 364.

(k) *Omealy v. Newell*, 8 East, 364. *Molling v. Buckholtz*, 2 M. & S. 563. (l) H. 48 G. 3. K. B. 9 East, 325. C. P. 1 Taunt. 203. In Ex. 7 Price, 354. *Manning*, Ex. Pr. App. 223.

(m) *Charter v. Jaques*, Cowp. 529. ——— 1 Wils. 335.

value of the goods," had been holden insufficient, as it did not disclose in positive terms any legal cause of action against the defendant, for although it was alleged that the defendant refused to deliver up the property, it did not appear that the goods ever were in his possession.<sup>(n)</sup> So a deposition, averring generally, that the defendant was indebted to the plaintiff in trover, had been considered equally defective. <sup>(o)</sup>

General  
qualities in  
particular  
actions.

In trover.

Since the introduction of the rule of Hilary Term, 48 G. 3. which ordered "that no person should be held to special bail in an action of trover or detinue, without an order made for that purpose by the Lord Chief Justice, or one of the judges of the court," the affidavit must fully set forth and detail the circumstances under which the defendant obtained possession of the property, its particular kind and value, and the manner in which the defendant converted and applied it to his own purposes. Where an affidavit to hold to bail was made by the assignees of a bankrupt in trover, for goods "of which the defendant had possessed himself, and which he had refused to deliver to the bankrupt before his bankruptcy and to the assignees since, and had converted them to his own use, as appears by certain documents referred to, "as this deponent believes," it was adjudged defective, as the facts were vouched by reference only to documents, and not supported by the substantive belief of the deponent. <sup>(p)</sup>

An affidavit in trover for a bill of exchange should state its value, and that the instrument remains due and unpaid.<sup>(q)</sup>

<sup>(n)</sup> Woolley v. Thomas, 7 T. R. 550.

<sup>(o)</sup> Hubbard v. Pacheco, 1 H. Bl. 218.

<sup>(p)</sup> Molling v. Buckholtz, 2 M. & S. 563.

<sup>(q)</sup> Clarke v. Cawthorne, 7 T. R. 321. See Mercer v. Jones, 3 Campb. 477. Atkins v. Wheeler, 2 N. R. 205.

## SECTION IV.

## OF THE FORMAL PARTS OF THE AFFIDAVIT.

IN addition to the general qualities of an affidavit to hold to bail, as attempted to be described in the three preceding sections, there are certain technical and formal parts which are necessary to be attended to in the formation of this document. These requisites, although points of form, and distinct from the gist or essence of the affidavit, and often unconnected with the facts or merits of the case, must be correctly stated, for a strict adherence to them is scrupulously enforced by all the courts, in order to preserve uniformity in their proceedings.

Title of the affidavit with reference to the court.

It is the preferable and ordinary practice in the Court of King's Bench, to entitle the affidavit as of that court, but the omission will not render it invalid, (r) if it can by any means be collected from the jurat that it has been sworn before a person authorized by the court to administer on oath. (s) When such an inference cannot be drawn it will be inadmissible, as where the affidavit was not entitled in any court, but the words "by the court," were only subscribed at the bottom of the jurat, it was considered insufficient, (t) although such subscription may have been the act of the proper officer, yet the court cannot take judicial notice of the officer's handwriting, (u) but these objections are not applicable to affidavits purporting to be sworn in court or before a judge

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(r) *Kennet v. the Avon Canal Company*, 7 T. R. 451. See precedents where the title of the court is omitted, 1 Richardson's Prac. 120. Lill. Ent. 612.

(s) In *Bland v. Drake*, 1 Chit. Rep. 165. where the affidavit was not entitled in the court, but purported at the foot of it to have been sworn before the deputy filazer, it was adjudged sufficient, as the court would take judicial notice of the filazer, being one of its officers.

(t) *Molling v. Poland*, 3 M. & S. 157. *The King v. Hare*, 13 East, 189. *Bevan v. Bevan*, 3 T. R. 601. (u) *Ibid.*

of the court. (x) In the Courts of Common Pleas and Exchequer, it would seem that an affidavit in which the name of the court is not inserted, cannot be read. (y)

Of the formal parts of the affidavit.

As an affidavit of debt is merely preliminary to suing out bailable process, and does not of itself constitute the commencement of an action, (z) an affidavit entitled in the intended cause would be irregular in the Court of Common Pleas, or Exchequer; (a) and in the King's Bench, the admission of such affidavits are expressly interdicted by a rule of court, ordering that "affidavits of any cause of action, before process sued out to hold defendant to bail, be not entitled in any cause, nor read if filed." (b)

Entitling the affidavit with reference to the cause.

In order to prevent the institution of groundless claims against a defendant, and to render the responsibility incurred by the parties deposing to the truth of affidavits more apparent, even to themselves, as well as to facilitate their detection if guilty of perjury, a rule of court was made in the Court of King's Bench, in Michaelmas Term 15, Car. 2. requiring that "the true place of abode, and true addition of every person who shall make affidavit in court, shall be inserted in such affidavit."

Of describing the deponent's place of residence, and addition in the affidavit.

The place of abode to be stated in conformity with this rule, should in strictness be the actual *bonâ fide* place of residence of the party, at the time of his deposing to the truth of the affidavit. (c) But although it is usual thus to describe the deponent's place of habitation or

Statement of the deponent's place of abode as required in K. B.

(x) The King v. Hare, 13 East, 189.

(y) Osborn v. Tatum, 1 B. & P. 271. 1 Manning, Ex. Prac. 88.

(z) R. T. 37 G. 3. K. B. 7 T. R. 454.

(a) Hollis v. Brandon, 1 B. & P. 36. Green v. Bradshaw, id. 227. 1 Mann. Ex. Pr. 83. See observations of Eyre, C. J. 1 B. & P. 37. contra.

(b) R. M. 38 Geo. 3. 7 T. R. 454. For authorities prior to the order, see King v. Cole, 6 T. R. 640. Clarke v. Cawthorne, 7 T. R. 321. As to inserting the parties' names in other cases, see Fores v. Diemar, 7 T. R. 661. The King v. the Sheriff of Surrey, 2 East, 182.

(c) Sedley v. White, 11 East, 528. Jarrett v. Dillon, 1 East, 18. D'Argent v. Vivant, id. 330. Bouhet v. Kittoe, 3 East, 154.

Of the formal parts of the affidavit.

Statement of the deponent's place of abode in K. B.

residence with some degree of minuteness and particularity, the rule has not received so rigid a construction as to render it indispensably necessary to insert the name of the particular street or square. Hence, where the party was described as of the city of London, (d) or of Chelsea, (e) it was considered to be a sufficient compliance with the rule. Where the affidavit is made by a clerk or a servant, his residence may be described to be the same as that of his employer. (f) If a party has left one place of abode and resides at another at the time of making the affidavit, describing himself as late of the place which he formerly occupied, would be regarded as an evasion of the rule. (g) But the principle which might be deduced from this decision, has been under particular circumstances, in some degree departed from; as it has been adjudged that a person discharged from prison, who continues to sleep there at night by permission of the keeper, and has no other determined place of residence, may describe himself "as late of the prison." (h) So where a person is employed a greater part of the day at one place, and sleeps at night at another, it may be stated in the affidavit that he resides at the former. (i) A foreigner who has landed here for temporary purposes, may describe himself as of his place of residence abroad, (k) but if he has a permanent and settled domicile in England, he should be described as of his place of abode in this country.

The rule of court in the King's Bench also, requires

(d) *Vaissier v. Alderson*, 3 M. & S. 165.

(e) *Holcombe v. Lambkin*, 2 M. & S. 475.

(f) *Anon.* 1 Chit. Rep. 464. *Anon.* 2 Chit. Rep. 15. *semble*, s. c.

(g) *Sedley v. White*, 11 East, 528. (h) *Ibid.*

(i) *Haslope v. Thorne*, 1 M. & S. 108.

(k) *Bouhet v. Kittoe*, 3 East, 154., in this case it was said, that if a foreigner's residence is in this country, a counter-affidavit disclosing that fact is allowable to impugn the affidavit.

that the party deposing should state his addition. *(kk)* The description of the parties' estate, degree, or occupation, should be set forth conformably with the rules which have been established by the courts, in the construction of the statute of additions, 1 Hen. 5. c. 5. It has therefore been decided, that describing the party "of the city of London, merchant," *(l)* or "gentlemen, of Chelsea," *(m)* is sufficient.

Of the formal parts of the affidavit.

Statement of deponent's addition in K.B.

When the deficiencies with regard to the deponent's place of residence, and addition are obvious upon the face of the affidavit, the court will discharge the defendant upon filing common bail; but, where these statements are apparently consistent with the rule 15 Car. 2. counter-affidavits will not be received, suggesting that those particulars are incorrect, but the party will be left to his remedy by indictment. *(n)*

There is no rule of the Court of Common Pleas, requiring a statement of the deponent's addition and place of abode, and it seems extremely doubtful whether the practice of the two courts in this respect assimilate. In *Polleri v. De Souza*, *(o)* it is said to have been determined that the affidavit must contain those descriptive statements; but in a more recent case, when *Jarrett v. Dillon* *(p)* was cited to shew the practice of the Court of King's Bench, it was observed, that that decision was founded entirely upon the rule of Mich. Term, 15 Car. 2. but that in the Court of Common Pleas there was no such regulation. *(q)*. In the Exchequer the practice is the same as in the King's Bench.

Statements of deponent's place of residence and addition required in the C. P.

After stating the deponent's name, place of residence, and addition, the affidavit ought and usually proceeds to

Statement that the affidavit is made on oath, &c.

*(kk)* *Jarrett v. Dillon*, 1 East, 18. *D'Argent v. Vivant*, id. 330.

*(l)* *Vaissier v. Alderson*, 3 M. & S. 165.

*(m)* *Holcombe v. Lambkin*, 2 M. & S. 475. See 1 Chit. Crim. Law, 203.

*(n)* Anon. 2 Smith, 207. cited 1 Tidd, 201. 7 edit.

*(o)* 4 Taunt. 154.

*(p)* 1 East, 18.

*(q)* Anon. 6 Taunt. 73. *Smith v. Younger*, 3 B. & P. 550.

Of the formal parts of the affidavit.

Description of defendant.

allege that the party maketh oath, or gives his affirmation, to the veracity of the facts detailed in the instrument, but an omission it appears in this respect, though informal and irregular, would not vitiate the affidavit, as it has been holden that saying "A maketh B. is indebted" omitting the word "oath" is sufficient, the jurat having been signed by the deponent. (r)

The rule of practice, which requires a description of the residence and addition of the party deposing to the facts to be given in the affidavit, does not extend to the party intended to be holden to bail, or a third person whose name may be incidentally introduced; and even where the initials merely of the defendant's Christian names were inserted in the affidavit the Court of Common Pleas, as the party had not been arrested under a wrong name, considered such an objection untenable. (s) But this case has since been overruled, and it is now settled that an affidavit to hold to bail by the initials of the defendant's Christian name only, even on a bill of exchange is irregular, and the court will order the bail-bond (if any has been given) to be delivered up to be cancelled, and will discharge the defendant upon entering a common appearance. (t)

### *Negating a Tender in Bank Notes.*

The stat. 37 Geo. 3. c. 45. s. 9. (u) enacts that during the continuance of the restriction on payments by the Bank

(r) Anon. Lofft. 85.

(s) Howell v. Coleman, 2 B. & P. 466. M'Beath v. Chatterley, 2 D. & R. 237. Parker v. Bent, 2 D. & R. 73. See Tomlins v. Preston, 1 Chit. Rep. 397.

(t) Reynolds v. Hankin, 4 B. & A. 536. Tomlins v. Preston, 1 Chit. Rep. 397., and cases cited 1 Chit. Rep. 398.

(u) See also 37 Geo. 3. c. 91. ss. 8, 9., 38 Geo. 3. c. 1. s. 8., 51 G. 3. c. 127., 52 Geo. 3. c. 50., 53 Geo. 3. c. 5., 54 Geo. 3. c. 52., 59 Geo. 3. c. 49. s. 1., 1 & 2 Geo. 4. c. 26.



of England, in cash, no person shall be held to special bail upon any process issuing out of any court, unless the affidavit made for that purpose under the stat. 12 G. 1. c. 29. ss. 1, 2. shall not only contain the matters thereby required, but also that no offer has been made to pay the sum mentioned and sworn to therein, in notes of the Governor and Company of the Bank of England, (x) expressed to be payable on demand, fractional parts of 20s. duly excepted; and if any process shall be issued upon which any person might before that act have been held to special bail, and no such affidavit is made, no person shall be arrested on such process, but proceedings shall be had as if no such affidavit had been made to hold him to bail, as required by the stat. 12 G. 1. c. 29. pl. 23.

Of the formal parts of the affidavit.

Negating a tender in bank notes.

By the 43 Geo. 3. c. 18., it is provided that in case of application made to any court in Westminster Hall, by any person held to special bail by virtue of any process of such court, to be discharged on common bail, by reason of any defect in such part of the affidavit as negatives, or is intended to negative any offer having been made to pay the sum therein mentioned, in bank notes, such person shall not be entitled to such discharge, unless he at the same time make proof by affidavit, that the whole sum for which he has been so held to bail, had been or was before such holding to bail, offered to be paid either wholly in such notes, or partly in such notes, and partly in lawful money of this kingdom.

Anterior to the introduction of the latter statute, numerous cases had occurred, in which the most trifling and minute deviation from the words prescribed in the stat.

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(x) It may not be improper to state, that Bank Notes are not made a legal tender by 37 Geo. 3. c. 45., but were intended by the legislature merely to exempt the party from arrest after tendering them in payment. *Grigby v. Oakes*, 2 B. & P. 526. *Wright v. Read* 3 T. R. 554.

Of the formal part of the affidavit.



37 Geo. 3. c. 45. was considered as fatal, and entitled the defendant to be discharged out of custody upon filing common bail: nor has the legislature by passing the 43 Geo. 3. c. 18. dispensed(y) with a general averment that no tender has been made, it has only aided mere technical or formal inaccuracies, where a counter-affidavit is not adduced on the part of the defendant, in which it is distinctly stated, that a tender of bank notes has been actually made. As advantage may therefore still be taken of formal defects, where a counter-deposition (z) is produced, it may not be altogether superfluous, succinctly to advert to the principal and leading cases in which these deficiencies have been considered to vitiate the affidavit.

The terms usually adopted in that part of the affidavit which negatives a tender in bank notes, are as follows: "And this deponent further saith, that no offer has been made to pay the sum of £——, or any part thereof in any note or notes of the Governor and Company of the Bank of England, expressed to be payable on demand." When the deposition is made by a person acting in a particular character, the form of the allegation is in some respects varied. The decisions connected with such an averment may be considered; 1st. With reference to the sum; 2dly. With reference to the description of the notes; 3dly. With reference to the person who is stated not to have made the tender; 4thly. With reference to the person making the affidavit, as when made by a partner, agent, assignee, or executor; 5thly. With reference to the form of action; 6thly. With reference to negating a tender;

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(y) *Wood v. Jenkins*, 2 Smith, 156. 1 Tidd, 7th ed. §12. s. c. *Crooks v. Holditch*, 1 B. & P. 176.

(z) *Allison v. Atkins*, 2 Chit. Rep. 18. *Armstrong v. Stratton*, 7 Taunt. 405. *Brown v. Davis*, 1 Chit. Rep. 161. *King v. Lord Turner*, id. 58. MSS. Easter Term, 1820, cited 1 Archbold's Practice, Addenda, 5.

when the affidavit has been made out of England; 7thly. Of the consequences of not taking advantage in the first instance of a defect in negating the tender.

Of the formal parts of the affidavit.

Where the debt sworn to contains the fractional part of a pound, negating a tender in bank notes of the said sum, not adding "or any part thereof," or confining it to the integral sum, is insufficient; for, *non constat*, a tender of bank notes may have been made of all but the fractional part. (a) But if the affidavit to hold to bail be for a principal sum *and upwards*, it will be a sufficient compliance with the act to negative a tender of *the said sum* in bank notes, that allegation having reference to the principal, which was such as might have been tendered as bank notes; (b) though if the negative of the tender could not consistently with a proper construction of the affidavit, refer to the integral sum mentioned, and capable of being tendered in bank notes, the affidavit would be defective: as where the plaintiff deposed that the defendant was indebted to him in 16*l. and upwards*, and negated a tender in bank notes of the said sum of 16*l. and upwards*; it was considered inaccurate, as the words denying the tender expressly referred to a sum exceeding 16*l.* (c)

Negating a tender with reference to the sum.

If in the clause of the affidavit, negating the tender of bank notes, they be described as notes of the Bank of England, "payable on demand," it will be a sufficient compliance with the stat. 37 Geo. 3. c. 45. s. 9., notwithstanding the words used in that act are "*expressed to be payable on demand.*" (d)

Description of the notes.

As negating an offer to pay by the defendant excludes the possibility of any tender having been made on his behalf, an affidavit, stating that the defendant made

Describing the person who is stated not to have made the tender.

(a) *Jennings v. Mitchell*, 1 East, 17. See Tidd, 7th ed. 210. n. f.

(b) *Maylin v. Townshend*, 2 East, 1.

(c) *Ford v. Lover*, 3 East, 110.

(d) *Fowler v. Morton*, 2 B. & P. 48.

Of the formal parts of the affidavit.

Describing the person who is stated not to have made the tender.

Negating tender of bank notes. When made by the creditor himself.

When made by a partner.

When made by an agent, the principal being in England.

no tender to pay in notes of the Bank of England, is sufficient, without saying, "or by any other person on his behalf;" (e) and even where the tender was disaffirmed, in indefinite terms, without saying by whom, the affidavit was considered unexceptionable; as that general denial comprehended every particular mode in which the tender could have been made, and satisfied the object of the statute. (f)

Where the creditor resides here, and the affidavit is made by him, the allegation, that no tender has been made, should be direct, positive, and unequivocal. Swearing to the best of the party's knowledge and belief that no tender has been made, is not a sufficient compliance with the section of the act. (g)

An affidavit by one partner should negative a tender of bank notes to himself, in express and positive terms, and deny that any tender has been made, to his co-partners, or either of them, to the best of his knowledge and belief. (h)

It may be stated as general proposition, that where the principal resides in England, it is not sufficient for his agent to negative a tender of the debt in bank notes to the best of his belief, but it ought to be stated in positive terms that no such tender has been made. (i)

The observations of Mr. Justice Best in *Brown v. Davis*, (k) (in which he is reported to have said, that it is not necessary that an agent should expressly negative a

(e) *Wyatt v. Smee*, 1 B. & P. 344.

(f) *Armstrong v. Stratton*, 7 Taunt. 405. 1 B. Moore, 110. s. c. But see 1 Tidd, 7th ed. 209, where it is said, that in the King's Bench, an affidavit that the defendant had not tendered the said sum, or any part thereof, in Bank of England notes, was holden insufficient, Lord Kenyon having observed, that the court had better abide by the words of the act of parliament. MS., M. T. 42. G. 3.

(g) *Elliott v. Duggan*, 2 East, 24. *King v. Lord Turner*, 1 Chit. Rep. 59.

(h) *Stacy v. Federici*, 2 B. & P. 390.

(i) *Cass v. Levy*, 8 T. R. 520. *Knight v. Keyte*, 1 East, 415. *Elliott v. Duggan*, 2 id. 24.

(k) 1 Chit. Rep. 161. see *Mayor, &c. of London v. Dias*, 1 East, 257.

tender of bank notes, if enough can be collected from the language of that part of the affidavit, to shew that it was not made,) cannot be viewed as having qualified the above position; as in that case no affidavit on the part of the defendant was adduced, alleging that an actual offer of bank notes had been made. As the court cannot be aware of what means an agent may have of satisfying himself of the fact, whether a tender has or has not been made, a deposition in the Court of King's Bench will not be rejected, because the agent of the plaintiff has ventured to negative in unequivocal terms, a tender of bank notes to his principal, as well as to himself, although it is not stated therein that the plaintiff is resident in a foreign country. (l) Until lately it was thought that an agent in the Court of Common Pleas, could not expressly negative a tender to his principal, (m) unless it could be collected from the whole context of the instrument, that he was enabled to do so from peculiar circumstances, (n) which might be disclosed by a supplemental and explanatory deposition; (o) but from a recent case, (p) it appears that that Court has now assimilated its practice to the Court of King's Bench.

Of the formal parts of the affidavit.

When made by an agent, the principal being in England.

When the principal resides abroad, it is a fixed and established rule, that the agent need not expressly deny that the debtor has not offered to pay the demand in bank notes. It is sufficient if he allege his belief that no such tender has been made. (q)

When made by an agent, the principal being abroad.

Where the assignee of a chose in action positively dis-

(l) Knight v. Keyte, 1 East, 414. Maddox v. Abercromby, H. 41 Geo. 3. cited Tidd, 7th ed. 211. n. e. Brown v. Davis, 1 Chit. Rep. 161.

(m) Smith v. Tyson, 2 B. & P. 339. Hammersley v. Mitchell, id. 389.

(n) Chatterley v. Finck, 2 B. & P. 390.

(o) Bolt v. Miller, 2 B. & P. 420. Lawson v. M'Donald, id. 590.

(p) Byland v. King, 7 Taunt. 275. 1 Moore, 24. s. c. Palleri v. De Souza, 4 Taunt. 154. Androni v. Morgan, id. 231.

(q) Munro v. Spinks, 8 T. R. 284. See 1 East, 237. 415.

Of the formal parts of the affidavit.

When made by the assignee of a bond, &c.

When made by the assignee of a bankrupt.

affirms a tender in bank notes to his assignor, it is unnecessary for the latter to be joined in the affidavit. (r)

Prior to the stat. 43 Geo. 3. c. 18. s. 2. it had been determined, that it was not only essential that an affidavit made by the assignee of a bankrupt should negative a tender of the debt in bank notes to himself or co-assignee, but that the deposition should also contain an averment that no tender had been made to the bankrupt.(s) Since the passing of that act, it would however appear to be sufficient to swear generally that no offer to pay the debt in bank notes has been made.(t) When the affidavit is sworn to by one of several assignees, it is only requisite for the party deposing, to make a positive denial of a tender in bank notes to himself, and negative a tender to his co-assignee, to the best of his knowledge and belief. (u)

In practice, it is usual for the bankrupt and one of the assignees to join in the affidavit; the former disaffirming a tender in bank notes antecedent, and the latter posterior, to the bankruptcy.

When made by an executor.

As an executor or administrator has no means of even acquiring a belief whether a tender has been made to his testator or intestate, it appears that an affidavit made by personal representatives need not negative a tender in bank notes to the deceased. (x)

Of negating a tender with reference to the particular form of action.

The several statutes (y) requiring a tender in bank notes to be negated, do not apply to the case of a defendant holden to bail in an action founded in *tort*, and for which he could only be arrested by permission of the

(r) *Byland v. King*, 7. Taunt. 275. 1 Moore, 24. s. c.

(s) *Martin v. Rance*, 8 T. R. 455. *Smith v. Barclay*, 3 B. & P. 219.

(t) *Armstrong v. Stratton*, 7 Taunt. 405. 1 B. Moore, 110. s. c.

(u) *Cresswell v. Lovell*, 8 T. R. 418. *Lawson v. M'Donald*, 2 B. & P. 590. *Smith v. Barclay*, 3 B. & P. 220.

(x) *Percy v. Powell*, 3 B. & P. 6. *Rooke J.* said, he thought it unnecessary for plaintiffs suing in the character of administrators, to negative a tender to their intestate.

(y) *Vide ante*, p. 174. n.(u)

court, or under a judge's order. Hence, a defendant arrested in trover, cannot be discharged out of custody on an objection to the form of the affidavit, for not negating a tender in bank notes, although the application be founded on an affidavit, stating that the value of the subject matter of the action has been, in point of fact, actually tendered to the plaintiff before the writ was sued out. (z)

Of the formal parts of the affidavit.

Of negating a tender with reference to the particular form of action.

An affidavit made out of England for the purpose of holding a party to bail, ought, in general, to contain all the requisites essential to the validity of an affidavit prepared in this country, and therefore it was deemed necessary, in a deposition sworn in Ireland, for the purpose of arresting the defendant in England, that it should be averred that he had not made a tender of bank notes, (a) and if an affidavit be made here to be used in Ireland, a clause denying a tender in Irish as well as English bank notes, ought to be inserted. (b)

Affidavit made out of England must negative a tender.

Where there is a defect in the allegation negating a tender of bank notes, which renders the affidavit insufficient, application should be made to the court in the earliest stage of the proceedings, to obtain the party's discharge, and before any subsequent steps have been taken in the cause; as advantage cannot be taken of such an irregularity after bail above have been put in, (c) or have justified; (d) or after plea, (e) or judgment by default, and notice of executing a writ of inquiry. (f)

At what time advantage ought to be taken of an omission in negating a tender of bank notes.

### *Of the Jurat.*

As the jurat is that part of the affidavit which describes the place at which the deposition has been sworn, and

(z) Anon. 4 Price, 306.

(a) Nesbitt v. Pynn, 7 T. R. 376. n. Stewart v. Smith, 1 B. & P. 132. n.

(b) Tidd, 209. 7th edit.


(c) Per Bayley, J. 1 M. & S. 230.

(d) Jones v. Price, 1 East, 80.

(e) 7 T. R. 376. n.

(f) Desborough v. Copinger, 8 T. R. 77.

Of the formal parts of the affidavit.



the particular officer by whom the oath has been administered; it will be expedient, before examining the formal mode of preparing this part of the instrument, to state the various persons authorized to take affidavits, whether made in this or a foreign country.

Before whom sworn in England.

The affidavit may be sworn before a judge, of the court, out of which the process issued, or before a commissioner duly authorized (*ee*) for that purpose, or before the officer issuing the process or his deputy. And it may be sworn before a commissioner, notwithstanding he is concerned as attorney for the plaintiff. (*ff*)

A special *capias* issued upon an affidavit sworn at the bill of Middlesex office, is irregular. It was contended that the practice was for the filazer to issue his writ upon the original affidavit, or an office copy of it, being transmitted to him; but the court considered that such could not be the practice, for that an affidavit made for one specific object could not be transferred to another, and perjury could not be assigned on the office copy. (*g*)

The judges of the Courts of King's Bench and Common Pleas in Ireland, have the same power of appointing commissioners to take affidavits in all parts of Great Britain, as they have in Ireland. (*h*)

(*ee*) The statute 29 Car. 2. c. 5. enacts, that "The judges of the K. B. or any two of them, the Chief Justice being one, and the same in the C. P., and the Lord Treasurer, Chancellor, and Barons of the Exchequer, or two of them, whereof the Lord Treasurer, Chancellor, or the Chief Baron, shall be one, may by Commissions under seal, of the respective courts, empower persons as Commissioners, in England, Wales, and Berwick, to take affidavits concerning any thing depending in those courts; and any judge of assize, on his circuit, may take affidavits to be filed in the offices, and used as other affidavits; and all persons forswearing themselves therein, shall incur the same penalties as if the same had been taken in open court." See R. G. H. T. 3 Geo. 4. 2 D. & R. 438.

(*ff*) R. E. 15 Geo. 3. Reg. 2. K. B. R. E. 13 Geo. 2. C. P. See 3 T. R. 403. 3 B. Moore, 326. 1 Rose, 145. 6 Price, 230. Wight, 62.

(*g*) Dalton v. Barnes, 1 M. & S. 230.

(*h*) The statute 55 Geo. 3. c. 157. s. 17. enacts, that "The Courts of K. B. and C. P. in Ireland, shall have the same power of granting commissions for taking affidavits in all parts of Great Britain, as they



A stamp duty of 10s. is imposed by 55 Geo. 3. c. 184. part 2. s. 3. on commissions for taking affidavits in England.

Of the formal parts of the affidavit.

As the statute 12 Geo. 1. c. 29. does not interfere with the power of the courts, to grant orders at their discretion, for holding a defendant to bail, it is a settled principle, that a deposition made out of His Majesty's dominions, or in the countries annexed to the crown of England, and duly verified here, may be made available as the foundation for obtaining an order from the court or a judge, although not sufficient of itself to authorize an arrest. (i)

Before whom sworn in England.

An affidavit made in Scotland or Ireland, should be sworn before a magistrate competent to administer an oath, and in the presence of a third person who can prove the handwriting of the judge before whom the deposition was taken. It has been observed, that where an affidavit of debt is made in either of these countries, the party verifying it should depose that it was made by the plaintiff, that the handwriting subscribed is the plaintiff's signature, that it was made and taken before a magistrate, who deponent believes had competent authority to administer an oath, and that the name of the person subscribed to the affidavit is the handwriting of such magistrate; (k) but these various statements are not according to the present practice usually introduced, as the handwriting of the magistrate appears to be the only fact that need be verified. Thus, where an affidavit of debt, containing no place in the jurat, but purporting to be sworn before the Chief Justice of the Court of King's Bench in Ireland, and to bear his signature, the authenticity of

Before whom sworn in Scotland or Ireland.

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now respectively have in Ireland; and every person wilfully swearing falsely in any affidavit to be made before any person empowered to take affidavits under the above authority, shall be deemed guilty of, and incur the punishment of perjury." As to the Isle of Man, see 6 Geo. 3. c. 50. s. 2.

(i) *Omealy v. Newell*, 8 East, 364. *French v. Bellew*, 1 M. & S. 309

(k) See 1 Lees, Dic. Prac. 18.

Of the formal parts of the affidavit.

Before whom sworn in Scotland or Ireland.

which was proved upon oath, it was considered sufficient to authorize granting a judge's order to hold the defendant to bail.<sup>(l)</sup> Lord Ellenborough, in the case just referred to, observed, "The only question is this, whether in the exercise of our discretion, we must not presume that the Chief Justice of Ireland acted within that jurisdiction within which alone he was competent to act, viz. by taking the affidavit and subscribing his name to it in Ireland? I think we cannot presume that he acted in this case out of his jurisdiction. The practice of the court in requiring an affidavit to be made for the purpose of arresting under a judge's order, is for the guidance of its discretion, that the amount of the debt may be made to appear before the court interposes its authority. It is in the nature of a solemn certificate of the existence and reality of the debt, but that may be made to appear by any such species of evidence as the court may deem in its nature reasonable. Is this then such a solemn certificate as the court may reasonably be satisfied with? I think, considering the high office of the person whose signature the affidavit bears, we ought to give credence to it, as an act done conformably to the authority vested in him."

Before whom sworn abroad.

An affidavit of debt made out of the King's dominions<sup>(m)</sup> may be sworn before any judge, magistrate, or other per-

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<sup>(l)</sup> French v. Bellew, 1 M. & S. 302. <sup>(m)</sup> 8 East, 372. "It does not appear that any difference in point of reason or law exists between the holding to bail, as it is practised in the more frequent instances of affidavits made in Ireland and Scotland, and of affidavits made abroad, in places out of his Majesty's dominions. The practice in both cases must be equally warranted or unwarranted. In none of these cases can the party making a false affidavit be indicted specifically for the crime of perjury in the courts of this country; but in all of them, as far as the party is punishable at all, he is punishable for a misdemeanor in procuring the court to make an order to hold to bail, by means, and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose. The party injured thereby, is not without his remedy, nor the court without its due means of punishment, in respect of the abuse and contempt committed against its authority."

son empowered by the laws of the particular country, in which he is resident, to administer an oath. It has been consequently adjudged, that a deposition purporting to have been taken before a person designating himself "high bailiff and chief magistrate in the district of Douglas, in the Isle of Man," was sworn before a person of competent authority; (n) and it would appear, that an affidavit made before a British vice-consul, in the absence of the consul, would be admissible. (o)

Of the formal parts of the affidavit.

Before whom sworn abroad.

When an affidavit has been sworn abroad, with the design of being rendered available in England, the signature of the foreign magistrate, and his authority in the country where he resides, to administer oaths and take affidavits, must be verified by a proper deposition made here. (p) In *Omealy v. Newell*, (q) the affidavit to hold to bail had been made at Paris, before a person of the name of *Bonomée*, who stated "that it was sworn at Paris on (a certain day) before me, notary public, magistrate competent in this behalf, and duly authorized by the laws of France to administer oaths and take affidavits. Signed, D. F. C. Bonomée." It was decided that the affidavit would be effectual, the signature of Bonomée being established by a proper deposition, sworn in England, and that he was a magistrate of France, competent to administer a judicial oath, and take affidavits.

Having enumerated the officers who are legally qualified to administer the oath to parties making an affidavit of debt; it will be now proper to state the formal

(n) *Dalmer v. Barnard*, 7 T. R. 251.

(o) *Beawes, Lex Mercatoria*, 6th edit. 421. *Thurlt v. Faber*, 1 Chit. Rep. 463.

(p) *Omealy v. Newell*, 8 East, 364. *French v. Bellew*, 1 M. & S. 301. An affidavit verifying the handwriting of the officer before whom the affidavit of debt is sworn, must state the addition of the deponent. *Thurlt v. Faber*, 1 Chit. Rep. 463.

(q) 8 East, 364. See *Voght v. Elgin*, cited in *Omealy v. Newell*, id. 372.

Of the formal parts of the affidavit.

When sworn in court.

qualities and technical requisites which are essential to render this part of the instrument valid.

The place where the affidavit was made ought in general to be specified in the jurat. By this practice a medium is afforded to the courts, of ascertaining the authority of the person before whom it purports to have been sworn. (r) An affidavit not entitled in any court, but only subscribed with the words "by the court," at the bottom of the jurat, has been rejected as inadmissible; (s) but it is to be observed, that this decision is at variance with a prior determination of the Court of King's Bench, that affidavits not entitled in any particular court, but purporting to be sworn generally "in court," or "before a judge of the court," might be rendered available. (t)

When sworn before commissioner.

When the affidavit purports to be made before a commissioner, and is not entitled in any court, it should be stated in the jurat, that the commissioner before whom it was taken, was a commissioner of the court in which it is intended to be used; (u) and it may perhaps be inferred that if the affidavit be correctly entitled in the Court of King's Bench, it would not be material, that the officer before whom the affidavit was sworn, should be described as a commissioner of that court, if he was, in point of fact, duly authorized to take the deposition. (x)

When made before filazer.

An affidavit not entitled, but purporting to be sworn at the filazer's office, and before the filazer, will be sufficient, as the court will take judicial notice of the filazer, being one of its officers. (y)

(r) *The King v. The Justices of the West Riding of Yorkshire*, 3 M. & S. 493.

(s) *Molling v. Poland*, 3 M. & S. 157. *Osborn v. Tatum*, 1 B. & P. 271.

(t) *The King v. Hare*, 13 East, 189. See *Symmers v. Wason*, 1 B. & P. 105. *Bland v. Drake*, 1 Chit. Rep. 165. *French v. Bellew*, 1 M. & S. 302.

(u) *The King v. Hare*, 13 East, 189.

(x) *Kennet v. Jones*, 7 T. R. 451. *Omsley v. Newell*, 8 East, 364.

(y) *Bland v. Drake*, 1 Chit. Rep. 165.

It is a rule in the Court of King's Bench, "that upon every affidavit sworn in that court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat, and that no affidavit shall be read or made use of in any matter depending in that court, in the jurat of which there shall appear any interlineation or erasure." (z) In *Atkinson v. Thomson*, (a) it appeared that there had been an erasure above the jurat, and before the words "sworn, &c." the name of the commissioner having been written apparently by mistake. Mr. Justice Le Blanc decided, that as the jurat itself in this case was without any defect, the affidavit was admissible.

Of the formal parts of the affidavit.

When made by two or more persons.

Interlineation or erasure.

The same practice, as to the necessity of expressly naming the several deponents in the jurat, and excluding affidavits when there has been any interlineation or erasure, obtains both in the Court of Common Pleas and Exchequer. (b)

It is also a rule in the Court of King's Bench and Exchequer, that "where an affidavit is made before a commissioner, by a person who, from his signature, appears to be illiterate, the commissioner taking the affidavit, shall certify or state in the jurat, that it was read in his presence to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner. (c)

When made by illiterate persons.

When the affidavit is made by a person of this descrip-

(z) R. G. M. 37 G. 3. 7 T. R. 82. 8 Price, 501. Anon. 2 Chit. Rep. 19. (a) 2 Chit. Rep. 19.

(b) Reg. Gen. 8 Price, 501. See *The King v. Sheriff of London*, 1 Price, 338. Anon. 2 id. 1. contra.

(c) R. G. E. 31 Geo. 3. K. B. 4 T. R. 284. R. G. 1 G. 4. Exchequer, 8 Price, 501. If the deponent is unable to write, any mark may be affixed as a substitute for his signature. See *Allworthy's Bail*, 2 Chit. Rep. 92. Anon. id.

Of the formal parts of the affidavit.

tion, and from whose signature it is obvious he was illiterate, the jurat must not only state that the affidavit was read over and explained to him, but must allege that the deponent understood the contents of the document to which his name is subscribed. (d) If the affidavit be made by a Quaker, that circumstance should be noticed in the jurat.

Of the stamp.

By the general stamp act, (e) a duty of 2s. 6d. is imposed on all affidavits to be filed or read in any of the courts of law or equity at Westminster, or of the great sessions in Wales, or of the counties palatine of Chester, Lancaster, and Durham, or before any judge or master of the said courts. In the construction of this clause of the statute, it has been decided that there must be a separate stamp for each distinct affidavit, before the same can be read or used; (f) but where an affidavit is made in the same cause and relating to the same subject matter, only one stamp will be required, although there be several deponents. (g) In the Court of Common Pleas, where the affidavits in four causes, were *each* of them entitled in *all the four*, but there was only one stamp on each affidavit, and an objection was taken on that account, the Court held the objection fatal, but allowed the counsel to amend by striking out three of the names, and reswearing the affidavit in the fourth cause, which was considered to render them valid for the purposes of that action. (h)

Separate affidavits will require distinct stamps, notwithstanding the circumstance of their being all comprised in the same sheet of paper. (i)

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(d) Anon. 2 Chit. Rep. 92. Allworthy's Bail, *ibid.* Anon M. T. 3 Geo. 4. MS.

(e) 55 Geo. 3. c. 184. See 49 Geo. 3. c. 149.

(f) *The King v. Carlisle*, 1 Chit. Rep. 451. Anon. *id.* 452. n. *Atkins v. Reynolds*, 2 Chit. Rep. 14. (g) *Id.* 45. n.

(h) Anon. 3 Taunt. 468. See *Chitty v. Bishop*, 4 B. Moore, 413.

(i) Anon. 1 Chit. Rep. 452. n. See *Gilby v. Lockyer*, Doug. 217.

## SECTION IV.

**DURING WHAT TIME THE AFFIDAVIT CONTINUES IN FORCE.**

As the statutes require an oath to be made of a debt subsisting at the time of suing out the process, the affidavit to hold to bail according to the practice of the courts, continues in force for one year only, during which period the defendant may be arrested on the first or any subsequent process; where therefore more than twelve months have elapsed since the making of the affidavit, a second deposition should be made anterior to suing out the process. In the Court of King's Bench, where the plaintiff, previous to going abroad in 1744, made an affidavit of debt, but the process was not taken out until 1747, the defendant was discharged on filing common bail. (k) But in a more recent case, where the writ was issued soon after the affidavit was made, and the process regularly continued until the time of the defendant's arrest, which did not take place for upwards of three years, the Court of Common Pleas held the length of time which had elapsed between the swearing of the affidavit and the caption of the defendant, no objection, and refused to discharge him on a common appearance. (l)

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SECTION V.**OF SUPPLEMENTAL AND EXPLANATORY AFFIDAVITS.**

THE practice of the Court of King's Bench and Exchequer, is invariably to reject as inadmissible, supple-

In King's  
Bench and  
Exchequer.

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(k) Collier v. Hague, 2 Stra. 1270.

(l) Cited 1 Archbold's Practice, 57. MS. Crooks v. Holditch, 1 B. & P. 176.

Of supplemental and explanatory affidavits.

In King's Bench and Exchequer.

mental or explanatory depositions, to rectify an omission, or to explain an ambiguity in the original affidavit of debt. This rule is founded partly on the ground, that if supplemental affidavits were received, the original would be drawn with carelessness, and lead to the practice of arresting parties on vague and ambiguous documents; and partly, because it would be a direct violation of that act, which requires that a perfect and proper affidavit should be made antecedent to the party's being holden to bail.<sup>(m)</sup> But there appears to be a distinction between receiving supplemental affidavits to explain ambiguities, after issuing the process and before acting upon it, and admitting them subsequent to the arrest. In the former case they are permitted to be used;<sup>(n)</sup> as where an affidavit alleged, that the defendant was indebted in 40*l.* without any statement of the cause of action, and the plaintiff, on discovering his mistake, made a proper affidavit before a warrant had been granted by the sheriff; the Court said, "though it may be regular in the course of things to file an affidavit before process sued out, yet it can never be intended as the ground of the process, but of the arrest only."

In Common Pleas.

Where the affidavit to hold to bail is defective, the Court of Common Pleas will exercise its discretion in receiving or rejecting supplemental and explanatory affidavits, and has not, in every instance, as in the other courts, expressly interdicted the admission of these auxiliary documents. But allowing them to be read is considered an indulgence; and according to the more recent de-

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<sup>(m)</sup> *Heathcote v. Goslin*, 2 *Stra.* 1157. *Cope v. Cooke*, 2 *Doug.* 467. *Emerson v. Hawkins*, 1 *Wils.* 335. *Smith v. Fraser*, 1 *Bl. Rep.* 192. *Mackenzie v. Mackenzie*, 1 *T. R.* 716. *Jacks v. Pemberton*, 5 *id.* 552. *Imlay v. Ellefson*, 2 *East*, 453. *Molling v. Buckholtz*, 2 *M. & S.* 563. 1 *Manning*, *Exchequer Prac.* 89.

<sup>(n)</sup> *Hodhouse v. Hansell*, 1 *Burt*, 117.; and see *Imp. C. P.* 135.



cisions, a favour that ought to be very seldom and very sparingly conceded. (o) A supplemental affidavit, even in that court, will never be received, unless to supply something which is ambiguous on the face of the original instrument, and which the court, for its own satisfaction, is desirous of having explained. (p) On this ground, where the affidavits were entitled, E. H. plaintiff, and W. B. defendant, and in the body of the deposition the party was described all throughout as defendant, the court suggested the expediency of obtaining a supplemental affidavit to ascertain with precision, who was intended by the person called the defendant; (q) and it has been since determined, that an omission by an executor to swear to his belief, may be remedied by a supplemental deposition. (r) In *Hobson v. Campbell*, (s) where the plaintiff, after stating in his affidavit to hold to bail, that the defendant was indebted on a bond conditioned for the payment of bills, which should be returned from India protested for *nonpayment*, alleged that the bills were returned protested for *nonacceptance*; the court decided, that the defect might be rectified by filing an ancillary document.

Of supplemental and explanatory affidavits.

In Common Pleas.

The indulgence allowed in the Court of Common Pleas, of aiding defects in the original affidavit, by permitting the plaintiff to have recourse to explanatory depositions, does not however extend to the admission of them, where they would not conduce to the elucidation of an ambiguity, but would be merely available as a substitute for an original affidavit. Thus, if an affidavit does not con-

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(o) *Armstrong v. Stratton*, 1 B. Moore, 112. 7 Taunt. 405. See *Mackenzie v. Mackenzie*, 1 T. R. 717.

(p) *Green v. Redshaw*, 1 B. & P. 227.

(q) *Hollis v. Brandon*, 1 B. & P. 86.

(r) *Garnham v. Hammond*, 2 B. & P. 298.

(s) 1 H. Bl. 245.

Of supplemental and explanatory affidavits.

In Common Pleas.

tain any positive oath, (*t*) or does not state any cause of action, (*u*) or does not negative a tender of bank notes, (*x*) or is made by a person who has been convicted of felony, (*y*) the court will not permit the introduction of a supplemental deposition.

## SECTION VI.

### OF CONTRADICTORY OR COUNTER AFFIDAVITS.

When admitted in King's Bench and Exchequer.

As no supplemental affidavit is allowed to be filed on the part of the plaintiff in the Court of King's Bench or Exchequer, in support or confirmation of the original document, it is a fair and equitable rule, that the defendant shall not be permitted to avail himself of cross or counter affidavits, (*z*) to impugn the deposition of the plaintiff. If such a practice were allowed, it would lead to endless conflicting affidavits, and would be examining upon summary applications, the merits of the question intended to be investigated before a jury. This rule has been preserved with such strict inviolability, that an affidavit of the plaintiff's confession, that the defendant was not indebted to him, (*a*) or that the supposed defendant was not the person described in the process, has been deemed inadmissible. (*b*) There are, however, two

(*t*) *Reeks v. Groneman*, 2 Wils. 224. See 2 B. & P. 298. note (*c*).

(*u*) *Cooke v. Dobree*, 1 H. Bl. 10. *Armstrong v. Stratton*, 1 B. Moore, 110.; 7 Taunt. 405. s. c.

(*x*) *Stewart v. Smith*, 1 B. & P. 132.

(*y*) *Nichols v. Dallyhunty*, Barnes, 79. Pr. Reg. 49. s. c. See also *Bland v. Drake*, 1 Chit. Rep. 165.

(*z*) Anon. 1 Lord Raym. 383.; 1 Salk. 99—100. *Cope v. Cooke*, 2 Doug. 467. *Emerson v. Hawkins*, 1 Wils. 335.

(*a*) *Emerson v. Hawkins*, 1 Wils. 335.

(*b*) *Salter v. Shergold*, 3 T. R. 572.

cases recently reported, which appear totally inconsistent and irreconcilable with the general practice. In *Jackson v. Tomkins* (c) it is said, that Mr. Justice Dampier admitted an affidavit on the part of the defendant, that the account upon which he had been holden to bail, had been settled in writing at a much less sum than the amount endorsed upon the writ; (d) and in a case stated by the court, in *Horsley v. Walstab*, (e) to have occurred on the Western Circuit, where a defendant had been arrested in an action of trover, for the sum of 10,000*l.*, the magnitude of the amount, and the nature of the action induced the judge to discharge the defendant on his producing a counter-affidavit. But it is presumed, from the peculiarity of the circumstances which gave rise to both those decisions, that they will never be recognized as affording a satisfactory precedent for future concessions.

Of contradictory or counter-affidavits.

When admitted in general in King's Bench and Exchequer.

It may here be proper to advert to a case which may appear, on a cursory examination, to form an exception to the rule prohibiting the admission of counter-affidavits. In *Sumner v. Green* (f) it was decided, that if there be probable ground to suspect that the securities upon which the defendant has been holden to bail, are illegal, the court will discharge him upon entering a common appearance; but from the report of that case, it may be collected, that the ground for inferring that the contract was connected with an illegal transaction, was derived from the plaintiff's original affidavit, and not established through the medium of a counter-deposition.

The rule which requires and enforces the rejection of

(c) 2 Chit. Rep. 20. Mich. Term, 1816.

(d) See Anon. 1 Ld. Raym. 383. 1 Salk, 99. s. c. contra.

(e) 7 Taunt. 236. 2 Marsh, 548.

(f) 1 H. Bl. 301. See *Whitwick v. Banks*, Forrest, 153.

Of contra-  
dictory or  
counter-  
affidavits.

When ad-  
mitted in  
general in  
King's  
Bench and  
Exchequer.

In the Com-  
mon Pleas.

counter-affidavits, only extends to such as attempt to impeach the facts connected with the merits of the case, as it is in the power of the defendant to disclose by cross-affidavits, new circumstances, not invalidating the plaintiff's prior statements; as that the defendant is privileged from arrest, or has been before holden to bail in this country for the same cause of action. (g) It is, however, doubtful whether this rule obtains, where a party has been arrested and bailed in a foreign country; at all events, it will only be recognized when it appears from the counter-affidavit, that the laws of the foreign state will afford the same security to the plaintiff for his demand and benefit in prosecuting his suit in that country, as he might obtain in England.

As the Court of Common Pleas will in some cases admit supplemental and explanatory affidavits, it follows, that under peculiar circumstances it could not consistently with justice to the defendant, reject counter-affidavits, negating the facts disclosed in the first deposition. Conformably with this indulgence, where the right to bail is discretionary with the court, as in actions for torts, or other injuries creating a claim to unliquidated damages, that court, in determining whether an order to obtain special bail shall be granted, will permit a contradictory affidavit to be read on the part of the defendant; (h) but this privilege of using counter-depositions, does not appear to extend to cases where the subject matter in dispute is a debt and not a tortious injury. In *Horsley v. Walstab* the court said, "supposing we were convinced that the plaintiff was acting under a mistake in swearing,

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(g) *Imlay v. Ellefsen*, 2 East, 454.

(h) *Rushell v. Gately*, Ca. Pr. C. P. 148. *Prac. Reg. C. P.* 66. *Barnes*, 76. s. c. *Hadderweek v. Catmur*, *Prac. Reg. C. P.* 63.

as he has done, yet we cannot discharge the defendant, without taking upon ourselves to decide that there was no debt.” (i)

Of contra-  
dictory or  
counter-  
affidavits.

## SECTION VII.

### CONSEQUENCE OF THERE BEING NO AFFIDAVIT, OR THE AFFIDAVIT BEING DEFECTIVE.

ALTHOUGH in the preceding sections the consequences of not attending to the necessary requisites of an affidavit have been noticed, it may nevertheless be here useful, concisely to recapitulate the effects of any irregularity connected with these instruments. Where no affidavit to hold to bail has been made prior to the arrest, (k) or a judge's order, when necessary, obtained, or the affidavit is in any material respect defective, (l) or not regularly filed with the proper officer, (m) or essentially different from the process (n) or declaration, (o) the court upon application will discharge the defendant on filing common bail; or, under particular circumstances, will order the bail-bond to be delivered up to be cancelled.

Although it is a rule that the defendant cannot in general waive an error apparent upon the record, without giving a release of errors, (p) yet no objection can be

(i) 7 Taunt. 237.; 2 Marsh, 548.; but see *Shaw v. Hawkins*, Barnes, 72. *Manning v. Williams*, Barnes, 87. contra.

(k) See 12 G. 1. c. 29. s. 2. *Chapman v. Ryall*, Barnes, 415. See vide *Wiskard v. Wilder*, 1 Burr. 830.

(l) *Norton v. Danvers*, 7 T. R. 375.

(m) *Hassey v. Baskerville*, cited in 2 Wils. 225.

(n) ——— v. *Rennolls*, 1 Chit. Rep. 659. n. *Anon.* id. 660. n.

(o) *Tetherington v. Goulding*, 7 T. R. 80. *Wilks v. Adcock*, 8 id. 27. *Spalding v. Mure*, 6 T. R. 363; and see 2 H. Bl. 278.; 2 B. & P. 358.; 7 Taunt. 304.; 1 Moore, 51.; 2 Taunt. 107.; 1 Chit. Rep. 659.

(p) *Norton v. Danvers*, 7 T. R. 376.

Consequence of there being no affidavit, or its being defective.

In the Common Pleas.

taken to the sufficiency of the affidavit to hold to bail after the plaintiff has been permitted to take a subsequent step in the cause. (*q*) Hence, where the defendant, not being under an arrest, has voluntarily given a bail-bond, (*r*) or has put in (*s*) or perfected bail, (*t*) or pleaded to the action, (*u*) or suffered judgment by default, and notice of executing a writ of inquiry has been given, (*x*) the defendant cannot, after such an implied acquiescence in the plaintiff's proceedings, object to the affidavit to hold to bail.

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## CHAPTER VI.

### OF THE BAIL-BOND, AND PROCEEDINGS INCIDENT THERETO.

#### SECTION I.

##### IN WHAT CASES THE SHERIFF IS OR IS NOT BOUND TO TAKE BAIL.

Introductory observations.

IN the chapter (*a*) devoted to the developement of the origin and progress of the law of bail, it was shewn that at common law the sheriff was not compellable to take bail from a defendant upon mesne process, unless he previously sued out a writ of mainprize; and it may be remembered, that it was there stated, that this arbitrary

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(*q*) *Desborough v. Copinger*, 8 T. R. 77.

(*r*) *Ibid.* *Norton v. Danvers*, 7 T. R. 375.

(*s*) 1 M. & S. 230. 6 Taunt. 135. 1 East, 330.

(*t*) *Jones v. Price*, 1 East, 81. *D'Argent v. Vivant*, 1 East, 330. 1 B. & P. 132., 2 Stra. 1077. (*u*) 7 T. R. 376. n.

(*x*) *Desborough v. Copinger*, 8 T. R. 77. In *Dalton v. Barnes*, 1 M. & S. 230., Bayley, J. said, "There was not any instance in which the party, after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail."

(*a*) Chap. 1. p. 8.

power vested in the sheriff, being not unfrequently abused to accomplish some sinister, vindictive, or other illegal purpose, was abolished at an early period of our judicial polity, and that the sheriff was commanded by an act of the legislature, to take security for the defendant's appearance on the return-day of the process.

In what cases the sheriff is or is not bound to take bail.

Introductory observations.

The preamble of the statute, *(b)* which effected this material alteration, recites “ that the King, considering the great perjury, extortion, and oppression, which be and have been in this realm by his sheriffs, under sheriffs, and their clerks, coroners, stewards of franchises, bailiffs, and keepers of prisons, and other officers, in divers counties of this realm ;” and then the 5th section of the statute enacts, “ that the said sheriffs, and all other officers and ministers aforesaid, shall let out of prison all manner of persons, by them, or any of them arrested, or being in their custody, by force of any writ, bill, or warrant, in any action, personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such places as the said writs, bills, or warrants shall require ;” and by the 7th section it provided, “ that no sheriff, or any of the officers or ministers aforesaid, shall take or cause to be taken, or make any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person nor by any person which shall be in their ward, by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants, shall require.” And by the 8th section, “ if any of the said sheriffs, or

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*(b)* 23 Hen. 6. c. 9.

In what cases the sheriff is or is not bound to take bail.

Introductory observations.

other officers, or ministers aforesaid, take any obligation in other form, by colour of their offices, that it shall be void." And by the 11th section it is enacted "that the sheriffs, &c. offending, &c. against this act, shall lose to the party so damaged or aggrieved, for every offence, his treble damages, and also 40*l.*, one half to the King and one half to the party suing for the same." And by the 14th section, "if the said sheriffs return upon any person *cepi corpus*, or *reddidit se*, they shall be chargeable to have the bodies of the said persons at the days of the return of the said writs, bills, or warrants, in such form as they were before the making of the said act. (c)

The stat. 23 Hen. 6. is a public law.

This statute was anciently considered as a private law, (d) but in *Samuel v. Evans*, (e) in which all the authorities were collected, it was finally adjudged to be a public act, and that the court were bound to take judicial notice of it, although not specially pleaded. It was in that case observed, that whatever might have been the law anterior to the statute of Queen Anne, the decision in *Saxby v. Kirkus* (f) had removed all doubt, for the court had in the latter case observed, "that although the stat. 23 H. 6. c. 10. was a private law, yet the act of 4 & 5 Ann. having enabled the sheriff to assign such bond, the court must

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(c) Where an officer has permitted a prisoner to go at large, without taking a bail-bond, and has in consequence of his nonappearance been obliged to pay the creditor the amount of his debt, the officer cannot maintain an action against the defendant for money paid. *Pitcher v. Bailey*, 8 East, 171. But where an officer discharged a prisoner arrested on *mesne process*, on payment of the sum sworn to and costs, and was afterwards obliged to pay the *residue* of the debt, it was holden by Mr. Justice Buller, that as the officer had not been guilty of any improper conduct, and as he was by law compellable to pay the whole debt, he was entitled to recover against the defendant for so much money paid to his use. *Cordron v. De Masserene*, Peake, N. P. C. 143.

(d) *Bentley v. Hore*, 1 Lev. 86. *Laughton v. Gardner*, Moor, 428. *Graham v. Crawshaw*, 3 Lev. 74. Bul. N. P. 224.

(e) 2 T. R. 569. *Lovell v. the Sheriff of London*, 15 East, 321.

(f) Bul. N. P. 224.



take notice of the law that originally compelled him to take the security." (g)

In what cases the sheriff is or is not bound to take bail.

On what process a bail-bond ought to be taken.

Attachment out of a court of law.

As the object of mesne process is only to compel the appearance of the party in court, to answer the charge exhibited against him, and the intention of final process to satisfy the plaintiff in the suit, it follows that the right to be discharged on bail must be confined to the former species, and does not extend to writs of execution; (h) and on that principle it was determined in a late case, (i) in the Court of Exchequer, (k) that the sheriff is not authorized by the statute to discharge out of custody, a defendant taken under an attachment issuing out of the courts of common law, for nonpayment of costs, such process being in the nature of an execution; but much doubt has been created as to the tenability of this proposition, by the subsequent case of *Lewis v. Morland*, (l) where it was determined that an attachment for nonpayment of costs, is not an order to detain the party in custody and to punish him for the contempt, but only to attach him, so that the sheriff may have his body to answer such interrogatories as may be necessarily exhibited against the defendant. Hence, an attachment of this description may be considered in the nature of mesne process; and if the party be in the

(g) *Benson v. Welby*, 2 Saund. 155. a.

(h) *Stepney v. Lloyd*, Cro. Eliz. 647. *Phelips v. Barrett*, 4 Price, 29.

(i) *Phelips v. Barrett*, 4 Price, 23. See Anon. 1 Stra. 479. *Field v. Workhouse*, Com. Rep. 264. s. p. *Rex v. Dawes*, 1 Ld. Raym. 722. 2 Salk. 608. s. c.

(k) In Mr. Manning's Exch. Prac. 51. it is said that it does not appear to be settled whether an attachment for a contempt in not obeying a *subpoena*, issuing out of the office of pleas, is within the statute 23 Hen. 6. and it seems to have been considered, that unless the case were within this statute, the sheriff had no authority to bail the party; but at common law, or by Westminster, 2. cap. 15. the sheriff might take bail in such a case if he thought proper. See F. N. B. 251. B.

(l) 2 B. & A. 56.

In what cases the sheriff is or is not bound to take bail.

Attachment out of a court of law.

Attachments out of Chancery.

sheriff's custody at the return of the writ, the latter would not be liable to an action for an escape. (m)

A distinction by counsel in argument, which may perhaps be tenable, has been taken between an attachment for non payment of money, and for an omission to perform other duties; it was said, that on the former, the sheriff might take bail, but the latter would only beailable through the medium of a judge's order. (n)

The right of a party to be discharged on entering into a bail-bond, on an attachment out of the Court of

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(m) It may be useful to subjoin part of Mr. Justice Bayley's judgment in *Lewis v. Morland*, 2 B. & A. 62., in which he observed "that an attachment at common law, issues upon the *ex-parte* affidavit of the person who demands the money awarded to be due by the Master's *allocatur*, stating that the same has not been paid. If that were final process, there would be nothing further to be done by the court but to commit; but that is not the practice, for interrogatories are filed to be answered, and the court ultimately pronounce upon those answers, whether the party is to be committed for contempt or not, for then only and not before does commitment take place. In the mean time, it is the usual course to admit the party to bail, and if on the return he may be bailed, it would be most singular that the sheriff should be bound to keep him in close custody, especially as it might appear, that the charge was unfounded, or that the writ had been served on the wrong person, or that after the issuing of the writ, payment had been already made to an agent duly authorized to receive the same. And it seems to me that it would be most mischievous if the doctrine contended for could be supported, for the sheriff in that case would not be at liberty to take security for the party, but would be bound always to keep him in close custody. The case of *Morris v. Hayward* (6 Taunt. 569. 2 Marsh, 280. s. c.) is an authority to shew, that although the sheriff is not bound to take bail upon an attachment, still if he does, he may recover upon the bail-bond. That indeed was the case of an attachment out of Chancery, but process issuing out of courts of law and equity stand on the same foundation. That case was decided upon great consideration, and is at variance with the subsequent case of *Phelips v. Barrett*, (4 Price, 23.) the foundation of which was that an attachment is a process in the nature of execution. But for the reasons I have already given, it seems to me that an attachment is in the nature of mesne process, and that the principle on which that decision took place cannot be supported."

(n) *Rex v. Aylett*, R. B. T. T. 25 G. 3. cited 1 Tidd, 243. n. d. 7th ed. Semble, a judge at chambers may take bail on such attachments, Anon. 1 Stra. 479.

Chancery on mesne process, (o) is not at all effected by the statute 23 Hen. 6. These securities have been repeatedly recognized as valid by courts of equity. (p) From the case of *Danby v. Lawson*, (q) which was decided in 1700, it appears that even at that period, it was considered as the established practice of the Court of Chancery, that the sheriff might under such circumstances, accept bail. But it is material to be remarked, that as these bail-bonds are not taken pursuant to the statute, but according to the common law, it is entirely in the discretion of the sheriff, whether he will release the party from custody on their being tendered. The act neither compels nor interdicts the acceptance of such securities. On the latter ground it has been determined, that an action is not sustainable against the sheriff, for refusing to take a bail-bond upon an attachment out of Chancery; (r) and, therefore, where the defendant is detained on account of the sheriff's refusal to take bail, he can only be relieved by applying to the Lord Chancellor, or the judge of the court out of which the process issued; (s) and if the sheriff take bail, it is not the practice as formerly, to make an order upon the sheriff to bring in the body, but the usual course seems to be upon the return of *cepi corpus*, to send a messenger to bring him before the court. (t)

In what cases the sheriff is or is not bound to take bail.

Attachments out of Chancery.

A similar practice appears to be adopted on the Equity side of the Court of Exchequer, (u) although in Bird-

(o) Bail-bonds on attachments out of courts of equity, cannot be taken after a decree has been pronounced, *Gilb. Rep.* 84. *Prec. Ch.* 331.

(p) *Burton v. Low*, *Sty.* 212, 234. *Lawson v. Haddock*, 2 *Vent.* 238. *Say v. Ellis*, 2 *Bl.* 955. *Studd v. Acton*, 1 *H. Bl.* 468. *Waddington v. Fitch*, *Barnes*, 64. *Field v. Workhouse*, 1 *Com.* 264. *Com. Dig.* tit. *Bail*, 18. *Morris v. Hayward*, 6 *Taunt.* 569. 2 *Marsh*, 280. s. c. *Bland v. Richards*, 3 *Leon*, 208. contra.

(q) *Prec. in Chan.* 110. 1 *Eq. Ca. Abr.* 350. pl. 4. s. c.

(r) *Studd v. Acton*, 1 *H. Bl.* 468. *Morris v. Hayward*, 6 *Taunt.* 569. 2 *Marsh*, 283. n.

(s) *Anon.* 1 *Stra.* 479.

(t) *Anon.* 1 *Atk.* 507. *Prec. Chan.* 331.

(u) *Hurd v. Partington*, 3 *Price*, 222.

In what cases the sheriff is or is not bound to take bail.

On criminal matters.

Liability of the sheriff for refusing to take a bail-bond when tendered.

wood v. Hart, (x) where a defendant had been arrested on an attachment for a contempt in not appearing to a *subpoena ad respondendum*, the court refused to grant a messenger to bring up the body of the defendant, as a bail-bond had been given to the sheriff, notwithstanding the penalty was very inadequate.

The sheriff is not authorized by the stat. 23 Hen. 6. c. 9. (y) to take a bond for the appearance of persons arrested by him under process issuing from the Quarter Sessions, or other courts of criminal jurisdiction; as the act was not passed to enable the sheriff to take bail in cases where he could not formerly discharge the party, but in order to compel him to take bail in those cases where he ought to have accepted such security, and refused to do so.

It has been shewn, that upon a bail-bond being tendered to the sheriff, with sufficient and responsible securities, (z) he is bound to discharge a prisoner arrested upon mesne process.

A refusal by the sheriff to accept such an indemnity, subjects him to a special action *on the case*, but not to an action of trespass. (a) The nonperformance of this duty does not render him a trespasser *ab initio*. (b)

The action must be instituted against the sheriff, (c) and cannot be maintained against his bailiff or other officer who actually rejected the bail-bond.

(x) 6 Price, 32.

(y) Bengough v. Rossiter, 4 T. R. 505.

(z) See Lovell v. Plomer, 15 East, 320.

(a) Salmon v. Peravall, Cro. Car, 196. Sir W. Jones, 226. s. c. 2 Roll Abr. 561. pl. 9. s. c. Bealy v. Sampson, 2 Vent. 96. Allen v. Robinson, Sid. 22. Rex v. Barlow, 2 Salk. 609. Smith v. Hall, 2 Mod. 31. Page v. Tulse, id. 84. Postern v. Hamstern, 2 Keb. 607. 2 Saund. 59. Matson v. Booth, 5 M. & S. 223.

(b) Ibid. For the grounds of this distinction, 1 Chit. pl. 185 to 187. 3d edit.

(c) Smith v. Hall, 2 Mod. 32.

## SECTION II.

## THE NATURE AND FORM OF THE BAIL-BOND.

In the preceding section it has been seen in what cases and under what circumstances, bail ought or ought not to be accepted by the sheriff. It will be here necessary to examine the nature, form, and general requisites of the bail-bond; as the stat. 23 Hen. 6. c. 9. requires that the security taken by the sheriff, on discharging persons arrested on mesne process, should be of the particular kind and form marked out and presented by that act. (d)

The general requisites of the different parts of this instrument, may be appropriately examined in the order in which they occur in the usual and customary forms. (e)  
 1st. The number of sureties required. 2dly. To whom the bail-bond must be made. 3dly. In what sum it must be taken. 4thly. With respect to its being under seal. 5thly. At what time it must be executed. 6thly. The condition in general. 7thly. The conformity of the condition with the process, as to the day and place of appearance. 8thly. The conformity of the condition with the process, as to the form of action. 9thly. The statement of whose suit the defendant was to answer. 10thly. The stamp required on the bond. 11thly. In what name the bond should be executed.

Although the legislature in describing the number of sureties upon a bail-bond to be tendered to the sheriff, have used the words, "surety of sufficient persons," yet

Number of  
sureties re-  
quired.

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(d) Rogers v. Reeves, 1 T. R. 418. But a bond given to the plaintiff or his attorney in another form than that which the statute requires, is valid; the distinction being where the security is to the plaintiff, and where it is made to the sheriff, Hall v. Carter, 2 Mod. 304, 305. Fuller v. Prest, 7 T. R. 110. Vide post, 206.

(e) See Form, Tidd's App. 106.

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and form of  
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bond.

Number of  
sureties re-  
quired.

as the clause was introduced for the sole benefit and advantage of that officer, if he choose to incur the responsibility of discharging the party, he may waive the right conferred on him by the act, and accept a bond with one surety only. (f) But he cannot legally refuse to accept bail because the number proposed to him is more than two. Thus, where a bond with five sureties, three of whom were respectively worth more than the penalty contained in the bond had been offered to the sheriff, he was holden liable to an action on the case for refusing to liberate the defendant. (g)

As the sheriff is liable to an attachment, if he does not bring in the body of the defendant on the return day of the writ, it has been invariably determined that the plaintiff cannot maintain an action against the sheriff for taking insufficient sureties, (h) or accepting persons as bail, who do not reside (i) within his county.

To whom  
bail-bond  
must be  
made.

The statute only authorizes sheriffs and bailiffs of franchises, who have the return of process, and to whom writs are directed, to take obligations for the appearance of persons arrested, and does not empower the sheriff's bailiff, or other subordinate officer, to discharge the party on bail. When, therefore, the process is directed to the sheriff, or an officer of a franchise, the bond of indemnity must be made to him, not as a private individual, but in the name of his ministerial office, (k) or particular court or

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(f) Sir W. Drury's case, cited Beawfage's case, 10 Rep. 100. Clyfton v. Web Cro. Eliz. 808. Blackbourn v. Michelbourn, id. 852. Cotton v. Wale, id. 862. Cook v. Brockhurst, Forts. 369.

(g) Matson v. Booth, 5 M. & S. 223.

(h) Lovell v. Plomer, 15 East, 320. Posterne v. Hanson, 2 Saund. 59. Barton v. Aldeworth, Cro. Eliz. 624. Allen v. Robinson, Sid. 22. Anon. Vent. 55. Parker v. Welby, id. 85. Grovenor v. Soame, 8 Mod. 122.

(i) 1 Salk. 99.

(k) Rogers v. Reeves, 1 T. R. 422. Cotton v. Wale, Cro. Eliz. 862. Scryven v. Dyther, id. 672. Thrower v. Whetstone, 2 Dy. 119. Beawfage's case, 10 Rep. 100. and Graham v. Cranshaw, 3 Lev. 74, 75. See Samuel v. Evans, 2 T. R. 569.

franchise. On error in debt, on bail-bond, it was excepted that it was not shewn that the sheriff was described in the bond by the name of his office.<sup>(l)</sup> The court were of opinion that it should so appear, <sup>(m)</sup> but they thought that in the case then under discussion, it sufficiently appeared on the whole declaration, it being laid *solvendo eidem vice-comiti et assignatis*.

The nature and form of the bail-bond.

To whom bail-bond must be made.

As a sheriff cannot take bail for a person arrested by the bailiff of a particular liberty within his county, it follows that a bond describing the sheriff as having taken bail on process, directed to the bailiff, would be unavailable; <sup>(n)</sup> but if the writ be addressed to the sheriff, though informally, instead of to the officer of the inferior jurisdiction, the bail-bond will be valid. <sup>(nn)</sup>

The statute 1 W. & M. st. 2. c. 2. s. 10. interdicts the sheriff from requiring *excessive bail*; and for the purpose of more effectually preventing any attempt at extortion or oppression, the stat. 13 Car. 2. st. 2. c. 2. points out and defines the amount for which bail shall be taken, by enacting, "that the sheriff or other officers to whom the writ or other process is directed, shall take bail for no more than the sum *endorsed on the back of such writ*."

In what sum it must be taken.

But notwithstanding this legislative regulation, it is the invariable practice to take a bond with a penalty in double the amount of the sum sworn to and endorsed on the writ. A system which has been directly sanctioned by the courts in several decisions. In *Norden v. Horsley* <sup>(o)</sup> it was said, "The making of the penalty exactly double

<sup>(l)</sup> *Nolls v. Cooper*, Palm. 378.

<sup>(m)</sup> *Symes v. Oakes*, Stra. 893.

<sup>(n)</sup> *Boothman v. the Earl of Surry*, 2 T. R. 10.

<sup>(nn)</sup> *Jackson v. Hunter*, 6 T. R. 71. *Grant v. Bagge*, 3 East, 131.

<sup>(o)</sup> *Barnes*, 159. 2 Wils. 69. s. c. *Turner v. Bailey*, Cas. Prac. C. P. 43. *Jennings v. Cortney*, Fortes. 336. *Male v. Mitchel*, Prac. Reg. C. P. 67. *Walker v. Carter*, 2 Bl. Rep. 816.

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be taken.

the sum sworn due may be a good rule. The act is directory to the sheriff, and in some respects prohibitory. If the defendant is oppressed, he may complain." A mistake, therefore, in the sum for which the bond is taken, will not render it invalid, if no intention of harassing the defendant be indicated. (p) And it has been decided that a bail-bond will not be absolutely void, although the sum sworn to has not been endorsed on the writ, or even if there have been no affidavit to hold to bail. (q) In these cases, the principal question discussed has been, whether the bond is void in consequence of there being no affidavit, or the amount of bail being excessive, not whether the sheriff would, under such circumstances, be liable to punishment for infringing the statute. In *Whiskard v. Wilder*, (r) where a declaration on a bail-bond was demurred to, on the ground that it did not state that there was an affidavit of debt, or that the sum sworn to was endorsed on the writ, Lord Mansfield said, "that though the sheriff *may be himself* answerable for such an omission, yet the bond is not void."

On attachments issuing out of courts of equity (s) or for a contempt in not obeying a *subpœna*, issuing out of the office of Pleas in the Exchequer, (t) it is usual for the sheriff to take a bond for the appearance of the defendant in the penal sum of 40*l.* (u)

The word "obligation" being adopted by the legislature, imports that the security must be under seal. Hence

In respect  
to its being  
under seal.

(p) *Whiskard v. Wilder*, 1 Burr. 330. *Norden v. Horsley*, 1 Wils. 69. *Mitchell v. Robertson*, 1 H. Bl. 76.

(q) *Whiskard v. Wilder*, 1 Burr. 330. See 12 Geo. 1: c. 29. s. 2. Barnes, 415.

(r) 1 Burr. 330.

(s) *Danby v. Lowson*, Prec. Chan. 610. 1 Eq. Ca. Abr. 350. pl. 4. s. c.

(t) 2 Saund. 59. a., and see *Phelips v. Barrett*, 4 Price, 23.

(u) See 13 Car. 2. st. 2. c. 2. s. 2.



an agreement in writing, not by deed, made by a third person, with the bailiff of the sheriff to put in good bail for a person arrested on mesne process, on or before the return of the writ, or to surrender the body to the bailiff, or in default thereof, to pay the debt and costs in consideration of his discharging the party arrested, is void; (x) and this rule prevails, even though the undertaking be given before an arrest has taken place, and when it was not in the power of the officer to execute the writ. Nor will the courts in virtue of their summary jurisdiction over their officers, interpose and enforce the performance of such contracts against an attorney, or afford the sheriff any relief. (y) Nor can an action be maintained by the latter on such contracts, as it is a settled principle of law, that a cause of action cannot be derived from an illegal source or culpable breach of duty. (z)

The nature and form of the bail-bond.

In respect to its being under seal.

The statute, however, only extends to obligations given to the sheriff, and does not affect such as are delivered to the plaintiff. Where, therefore, an attorney gives an undertaking to the plaintiff to appear for the defendant, he is bound to do so, and the courts will enforce the performance of this agreement by attachment, though the contract is not of the kind or in the form prescribed by the statute. (zz)

The sheriff may accept a bail-bond from the defendant and his sureties, prior to arresting him, and the bond will in such case be valid, if in other respects unobjection-

At what time it must be executed.

(x) *Rogers v. Reeves*, 1 T. R. 418. *Fuller v. Prest*, 7 id. 109. *Crow v. Watson*, 2 Chit. Rep. 93. *Sedgworth v. Spicer*, 4 East, 568. 2 Smith, 52. s. c.

(y) *Parker v. England*, 2 Smith, 52.

(z) *Pitcher v. Bailey*, 8 East, 171. See also *Sedgworth v. Spicer*, 4 East, 568. 2 Smith, 52. s. c. *Cordron v. Masserene*, Peake, N. P. C. 143.

(zz) *Milward v. Clerk*, Cro. Eliz. 190. *Benskin v. French*, 1 Sid. 132., 1 Lev. 98. s. c. *Rogers v. Reeves*. 1 T. R. 422.

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time it must  
be executed.

Condition of  
the bond.  
General  
rule.

ble. (a) But it is irregular in an officer to take a bail-bond before his warrant has been made out, or the writ, although issued, delivered to the sheriff. (b)

A bail-bond cannot be taken for the defendant's appearance, after the return day specified in the process. (c) And the assignee of the sheriff is, in that respect, in no better situation than the sheriff himself; but the former must take the assignment with all its consequences. (d) If the instrument be executed after the return of the writ, it being void *ab initio*, advantage may be taken of the irregularity under the general plea of *non est factum*. (e)

The condition of the bail-bond under the stat. 23 Hen. 6. c. 9. is essential and material to its validity, and if the terms and nature of the condition be not consistent with that act, the bond is absolutely void, and cannot enure even as a single bill. (f) But it is not required by the statute, that the nature of the action should be minutely described in the condition of the bond. If it sets forth in substance the parties, and the time and place of appearance, it is sufficient. Therefore, a mere informality or variance between the condition and process in the time and place of appearance, or description of the action, does not vitiate the bond. (g)

It is indispensable that the condition should be complete before the bond is executed. For where a bail-bond had been sealed and delivered, with only the penal part filled up, Lord Ellenborough decided, that the bond was void,

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(a) *Watkins v. Parry*, 1 Stra. 444. Forts. Rep. 364. s. c. *Haley v. Fitzgerald*, id. 643.

(b) *Hall v. Roche*, 8 T. R. 187.

(c) *Pullein v. Benson*, 1 Lord Raym. 352.

(d) *Thompson v. Rock*, 4 M. & S. 338.

(e) *Idem*.

(f) *Samuel v. Evans*, 2 T.R. 563; *Graham v. Crawshaw*, 3 Lev. 74.

(g) *Owen v. Nail*, 6 T. R. 702.

and that the defendant might avail himself of it under the plea of *non est factum*. (h)

To render the condition of the bond valid, it must be for the defendant's appearance on the return-day of the writ, in such place as is required by the process; but if it in substance state the place of appearance, although not in a strictly formal and technical manner, it will suffice. Thus it has been adjudged, that the condition of the bond for the defendant to appear *before His Majesty's Justices of the King's Bench at Westminster*, was no variance from the writ, which was to appear *before our lord the King at Westminster*. (i) And where an original writ was returnable *before our lord the King, wheresoever he should then be in England*, and in the condition the words *wheresoever, &c.* were omitted, it was objected that by the statute the sheriff could not take any bond, but such as corresponded with the writ; whereas the process here might have been to compel an appearance out of England, if the King should be absent from this country; but the court observed, that there was no set forms of words for bonds of this description, and that they would understand that by appearing before the King, meant before the King *in his court*, and not before His Majesty *in person*. (k) And where the writ was to appear on a general return day, before the King, wheresoever he should then be *in England*, and the bond was conditioned for the party's appearance before the King at *Westminster*, on the day specified in the writ, the variance was holden imma-

The nature and form of the bail-bond.

Conformity of the condition with the process, as to the day and place of appearance.

(h) *Powell v. Duff*, 3 Camph. 181. See Vin. Abr. tit. Bail, D. Com. Dig. Fait. A. 1. *Shelden v. Hentley*, 2 Show. 160. *Texira v. Evans*, cited 1 Anst. 228., and see authorities collected, Manning's Index, 110. pl. 13.

(i) *Kirbride v. Dyke*, 2 Lev. 180. *Lawson v. Haddock*, 2 Vent. 237. s. c.

(k) *Shuttleworth v. Pilkington*, 2 Stra. 1155. cited in *King v. Pip-  
pett*, 1 T. R. 240.

The nature and form of the bail-bond.

Conformity of the condition with the process, as to the day and place of appearance.

terial; (l) Lord Ellenborough observing "that Westminster, according to the common understanding of every body at this day, (considering that the Court of King's Bench had been invariably held there for many centuries, except only when it was removed, for a short period, to Oxford, in 1655,) was the place meant by the more general description in the writ, and that the variance in this case was certainly not greater than that in the case of *Shuttleworth v. Pilkington*." So where the condition of the bond was to appear in the office of pleas in the Court of Exchequer at *Westminster*, it was held sufficient, though the process was to appear before the *Barons*. (m)

But if the condition be utterly incapable of being performed,—as where the condition is for the appearance of the defendant at a day posterior to the execution of the bond,—the instrument is invalid; (n) and where upon process out of the Court of Common Pleas, the bail-bond required an appearance before *His Majesty at Westminster*, it was holden to be nugatory, as the words used in the condition were descriptive of the Court of King's Bench, and not of the Court of Common Pleas. (o)

The conformity of the condition with the process as to the form of action.

As the statute does not require the nature or the form of the action to be disclosed or noticed in the condition of the bail-bond, any statement of it may be considered as surplusage, and if inserted, an inaccuracy in the description, will not vitiate the instrument. (p) But as

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(l) *Jones v. Stordy*, 9 East, 55. In *Impey v. Taylor*, 3 M. & S. 166. it was held that an allegation that an action was depending in His Majesty's Court of the Bench at Westminster was not sustained by proof of a *pluries bill of Middlesex*, for by such allegation the Court of Common Pleas must be intended.

(m) *Philips v. Philips*, cited in *Shuttleworth v. Pilkington*, 2 Stra. 1156.

(n) *Samuel v. Evans*, 2 T. R. 569.

(o) *Renalds v. Smith*, 6 Taunt. 551. 2 Marsh. 358. s. c.

(p) *Kirbride v. Dyke*, 2 Lev. 180. s. c. by the name of *Kirkbrige v. Curwen T. Jones*, 46.

the form of action in which the party has been arrested, is usually mentioned in the condition, it may be proper to advert to the following decisions, in which a variance between the description of the form of action in the process, and that stated in the condition, has been considered immaterial; as where the writ was to answer the plaintiff in a plea of trespass, and the condition was general, without specifying any particular plea; (q) or where the condition was to answer the plaintiff in a plea of debt generally, but the writ was to answer the plaintiff in a plea of debt for 300*l.*; or where the process was to answer the plaintiff in a plea of trespass, and also to a bill of 100*l.* of debt, and the condition was to answer in a plea of trespass of 100*l.*; (r) or where the writ was to answer in a plea of trespass, and also to a *bill*, and the condition was in a plea of trespass *only*; (s) or where the process was in an action of *trespass* (t) or *trover*, (u) and the condition was to appear to answer in a plea of *trespass on the case upon promises*.

The nature and form of the bail-bond.

The conformity of the condition with the process as to the form of action.

In the case of *More v. Finch*, (x) it was determined that a bail-bond was void, because the condition did not state at *whose suit* the defendant was to answer; but from the foregoing decisions, in which it has been shewn that it is not necessary that the form of action should be stated in the condition, and from the case of *Rench v. Britton*, (y) where an objection that it was not mentioned in the condition of the bail-bond, by whom the action was brought, was overruled; it is evident that the name of the plaintiff need not be introduced in the condition. In the latter

Statement of whose suit the defendant is to answer.

(q) *Kirkbridge v. Wilson*, 2 Lev. 123, 124.

(r) *Cudwell v. Dunkin*, T. Jones, 137. s. c. by the name of *Gardiner v. Dudgate*, 2 Show. 51.

(s) *Grovenor v. Soame*, 6 Mod. 122. (t) *Owen v. Nail*, 6 T. R. 702.

(u) *Davenport v. Parker*, Forts. 368.

(x) 2 Lev. 177.

(y) 10 Mod. 327.

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Statement of  
whose suit  
the defen-  
dant is to  
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The stamp  
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In what  
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case, Parker, C.J. observed, "that the statute only requires that the sheriff should take a bail-bond conditioned for the appearance of the party, on such a day, at Westminster; it is not said even 'to answer the plaintiff,' or the whole writ might be omitted. If the party appear, he is bound to answer any bill that shall be filed against him; the bill in the condition of the bond cannot be intended to be any other than the bill of the plaintiff."

The 55 Geo. 3. c. 184. sched. part 2. imposes a duty of two shillings and sixpence on every bail-bond in courts of law. (z) The addition of another obligor after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligor, does not vacate the bond or make a new stamp necessary. (a)

Where a defendant has been arrested by a wrong name, the preferable course is for him to execute the bail-bond in his right name, stating that he was arrested by the name by which he was designated in the writ; for although his entering into it by a wrong name would not operate as an estoppel, it might be construed as evidence of his own admission of being known, as well by one appellation as the other. (b) It would nevertheless appear, that the circumstance of the defendant having entered into a bail-bond to the sheriff, by the wrong name, would not estop him from pleading the misnomer in abatement, in the original action. (c)

An arrest by a wrong name being illegal, the courts instead of obliging the defendant to plead the misnomer

(z) See 48 Geo. 3. c. 149. sched. part 2.

(a) *Matson v. Booth*, 5 M. & S. 223.

(b) *Gould v. Barnes*, 3 Taunt. 504. See *Meredeth v. Hodges*, 2 N. R. 453.

(c) *Smithson v. Smith*, Willes, 461. *Barnes*, 94. s. c. *Linch v. Hooke*, 1 Salk. 7.

in abatement, will in general, if he be not called and known by the name adopted in the process, as well as by his right name, set aside the proceedings, (d) and discharge him out of custody, or order the bail-bond to be delivered up to be cancelled; (e) but if the name used in the process be *idem sonans*, the court will not interfere. (f) And where A., having two christian names, has omitted one of them in his dealings with B., he cannot, in an action brought against him by B. make the omission a ground for setting aside the proceedings; (g) but if the party be arrested by the initials of his christian name only, the bail-bond will be set aside. (h)

The nature and form of the bail-bond.

In what name the bond should be executed.

The application for setting aside the bail-bond must be founded on an affidavit of the misnomer, and made before the expiration of the time for pleading in abatement; for where the defendant has had an opportunity of pleading the misnomer, and has neglected to avail himself of it in due time, he cannot afterwards apply to obtain indulgence through the summary interposition of the court, (i) nor will the defendant in any instance be relieved, except upon the terms of filing common bail and undertaking not to bring an action. (k) Although it is a general rule, in setting aside proceedings for irregularity, that the party complained of is liable to costs, (l) yet

(d) *Smith v. Innes*, 4 M. & S. 360. Evidence of the defendant having once or twice been called by the name he is sued by will not be sufficient, 3 M. & S. 453.

(e) *Smith v. Innes*, 4 M. & S. 360. *Smith v. Patten*, 6 Taunt. 115. *Binfield v. Maxwell*, 15 East, 159. *Wilks v. Lock*, 2 Taunt. 399.

(f) *Ahitbol v. Beniditto*, 2 Taunt. 401. *Dickinson v. Bowes*, 16 East, 110.

(g) *Walker v. Willoughby*, 6 Taunt. 530. 2 Marsh, 230. s. c.


(h) *Reynolds v. Hankin*, 4 B. & A. 536. *M'Beath v. Chatterley*, 2 D. & R. 237. *Parker v. Bent*, id. 73.

(i) *Smith v. Patten*, 6 Taunt. 115. *Binfield v. Maxwell*, 15 East, 159.

(k) *Kitching v. Alder*, 1 Chit. Rep. 282. *Smith v. Innes*, 4 M. & S. 360.

(l) *Conden v. Coulter*, Ca. Temp. Hard. 314. But see *Christie v. Walker*, 1 Bing. 187.

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as the plaintiff on entering a *nil capiat per breve*, after a plea in abatement, is not subject to the payment of costs; (m) it appears that the courts in analogy to this practice, will in the case of a misnomer, set aside the proceedings without costs. (n)

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### SECTION III.

#### OF THE FORFEITURE AND ASSIGNMENT OF THE BAIL-BOND.

HAVING in the immediately preceding section shewn the nature and terms of the condition to which a bail-bond must be subject, it may be here expedient to examine what will amount to a forfeiture within the meaning of that condition; the effect of the forfeiture, and the proceedings incident thereto.

When the defendant does not appear at the return of the writ according to the condition; that is, if he does not put in and perfect bail above in due time, even though not excepted to, (o) the bail-bond is forfeited, and the plaintiff has an election either to take an assignment of it or to proceed against the sheriff, to compel him to return the writ and bring in the body of the defendant, or in other words to put in and perfect bail. The former course is generally pursued, if the bail below are responsible persons, and sufficiently opulent to satisfy the demand of the plaintiff; but as taking an assignment of the bond and electing to proceed against the bail is a voluntary act, and exonerates the sheriff from his liability, particular care should be taken to ascertain whether the bail are competent to fulfil their engagement.

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(m) Hullock's Law of Costs, 126. 2d edit.

(n) Smith v. Innes, 4 M. & S. 360.

(o) Turner v. Cary, 7 East, 607. *Aliter* where the bail below become bail above. Babb v. Barber, 1 Anstr. 274.



At common law, the sheriff was not compellable to assign the bail-bond, (*p*) though it appears that if he declined doing it, the courts in the exercise of their summary jurisdiction, would have amerced him; (*q*) but the principal inconvenience attending the state of the law, anterior to the statute 4 & 5 Ann. c. 16. s. 20., (*r*) arose from the circumstance that after an assignment had been obtained, the party suing upon the bond was obliged to proceed in the name of the sheriff, who might at any time have released the action without the assent or concurrence of the plaintiff. To obviate these difficulties, the legislature by that act provided, “that the sheriff at the request and cost of the plaintiff or his attorney, shall assign to him the bail-bond, by endorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses without stamp, provided it be stamped before any action be brought thereon; and if the same be forfeited, the plaintiff after assignment made, may bring an action thereupon in his own name, and the court may by rule of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond, as is agreeable to justice and reason, and such rule of the court shall have the effect of a defeasance to such bail-bond.” And by the 24th section it is enacted, “that the statute shall extend to all courts of record in the kingdom.”

Of the forfeiture and assignment of the bail-bond.

Sheriff bound to assign the bail-bond.

The stat. 48 Geo. 3. c. 58. declares “that bail-bonds taken in actions at the suit of the King, shall be assigned to His Majesty.”

As these statutes are compulsory on the sheriff to assign the bond at the request of the party interested, if he re-

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(*p*) *Ellis v. Yarborough*, 1 Mod. 228.

(*q*) *Page v. Tulse*, 2 Mod. 84.

(*r*) This statute in Pickering's edition is stated to be the 5th Anne.

Of the forfeiture and assignment of the bail-bond.

Sheriff bound to assign the bail-bond.

Plaintiff is not obliged to accept assignment.

In what stage of the proceedings an assignment may be taken.

fuse he is liable to an action on the case; (s) but as the legislature only intended that the sheriff should be compelled to assign such bail-bonds as were valid and effectual at the time of the application being made to him for that purpose, it has been ruled, that an allowance of bail above, subsequent to the commencement of an action against the sheriff for not assigning the bail-bond, is a sufficient answer to such an action, provided the bail is put in and allowed, as of the term in which the writ is returnable; for when once they are put in and have justified, they are subsisting bail, and must be taken *nunc pro tunc*. (t) So if the bond be cancelled in consequence of the defendant returning into custody before the return of the process, an action cannot be maintained against the sheriff for not assigning the bail-bond. (u)

Although the plaintiff can insist on having an assignment of the bond made to him by the sheriff, the latter has not a commensurate right of compelling the plaintiff to accept it. (x)

It has been intimated, that from the general words of the statute 4 & 5 Ann. c. 16. a bail-bond may be assigned before forfeiture; (y) but this course of proceeding is unusual, in some cases unadvisable, and would often create unnecessary expense, as the plaintiff can derive no benefit from the assignment of the bond, before a breach of the condition has been committed; and it may be even inferred from the decision, in the case of *Dent v. Weston*, (z) that the bond is not strictly assignable until a for-

(s) *Stamper v. Milburn*, 7 T. R. 122. 2 Saund. 61. a. *Mendez v. Bridges*, 5 Taunt. 325.

(t) *Pariente v. Plumbtree*, 2 B. & P. 38. *How v. Lacy*, 1 Taunt. 119. *Mendez v. Bridges*, 5 Taunt. 325. *Turner v. Carey*, 7 East, 607. *Murray v. Durand*, 1 Esp. 87. *More v. Norris*, 4 M. & S. 397.

(u) *Jones v. Lander*, 6 T. R. 753. *Stamper v. Milbourne*, 7 id. 122. *Maddocks v. Bullock*, 1 B. & P. 325.

(x) *Rex v. Dawes*, 1 Ld. Raym. 723.

(y) *Paradice v. Haliday*, Barnes, 77.

(z) 8 T. R. 4.

feiture has been incurred. It was there determined, that if the *fourth* day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the court, an assignment of the bail-bond to the plaintiff in the evening of that day, is regular; (a) and the court then observed, that “as the fourth day expired on the last day of the term, it was competent to the plaintiff to take an assignment of the bail-bond on that day, *after the rising of the court*; and that the circumstances of that case were distinguishable from the common case, where the plaintiff *cannot* take such an assignment before the expiration of the fourth day.” But the plaintiff, at any time after the forfeiture is, in general, entitled to take an assignment of the bail-bond. This rule, however, is subject to some qualifications arising from peculiar facts; as where on staying proceedings in the original action, it was part of a rule *nisi* that all proceedings should be stayed, they were considered to be suspended for every purpose, until the rule was discharged; and that the plaintiff ought not in the mean time to have taken an assignment of the bail-bond; (b) and an assignment cannot be taken after the rule for the allowance of bail above has been served on the plaintiff, (c) or where the defendant has regularly surrendered himself to the sheriff before the return of the writ. (d) It is stated that the plaintiff cannot

Of the forfeiture and assignment of the bail-bond.

In what stage of the proceedings an assignment may be taken.

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(a) *Dent v. Weston*, 8 T. R. 4. (b) *Swayne v. Crammond*, 4 T. R. 176.  
 (c) *Murray v. Durand*, 1 Esp. 87. *How v. Lacy*, 1 Taunt. 119. and see *Pariente v. Plumbtree*, 2 B. & P. 35. *Allingham v. Flower*, 2 B. & P. 246. *Turner v. Cary*, 7 East, 607. *Jones v. Eamer*, 3 Anstr. 675. *The King v. the Sheriff of Middlesex*, 4 T. R. 493. *Edmond v. Ross*, 9 Price, 5.

(d) *Jones v. Lander*, 6 T. R. 753. *Stamper v. Milbourne*, 7 id. 122. *Maddocks v. Bullcock*, 1 B. & P. 325. *Hamilton v. Wilson*, 1 East, 383. See *Harrison v. Davis*, 5 Burr. 2683. See post. But as the sheriff is not bound, before the return of the writ, to accept the surrender of a defendant, whom he has released on giving a bail-bond, the defendant is not in his custody merely by surrendering to his gaoler and giving him notice thereof; (*Hamilton v. Wilson*, 1 East, 383.) though where the

Of the forfeiture and assignment of the bail-bond.

In what stage of the proceedings an assignment may be taken.

insist on an assignment of the bail-bond after he has made his election to proceed against the sheriff, by serving him with a rule to bring in the body; (e) and this conjecture is sanctioned by the case of *Pople v. Wyatt*, (f) from which it may be inferred, that after suing out an attachment against the sheriff for not bringing in the body, the plaintiff is precluded from insisting on an assignment, though if he *elect* to abandon the attachment and the sheriff consent to assign the bail-bond, such a mode of proceeding would not be irregular.

The plaintiff's right to an assignment of the bail-bond from the sheriff may be waived by the laches of the former, in not pursuing his action against the original defendant in proper time and in a regular manner. A distinction, however, prevails in the practice of the Courts of King's Bench and Common Pleas, with respect to what laches will amount to a constructive abandonment of his right to an assignment of the bail-bond. In the King's Bench, the plaintiff, notwithstanding it is an established rule of practice that he would be out of court, by not declaring within two terms after the return of the process, (g) may, even after that period has elapsed, take an assignment of the bail-bond; for by not putting in bail within the appointed time, the defendant has prevented the plaintiff from declaring in chief, and he is not obliged to declare in any case *de bene esse* within the time limited for the defendant's putting in bail; and after that time, he cannot declare until the defendant has actually appeared. And it

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defendant surrendered himself to the county gaoler before 12 o'clock, on the day the writ was returnable, and the under sheriff who resided seventeen miles off, accepted the surrender next day, it was holden sufficient. (*Plimpton v. Howell*, 10 East, 100.)

(e) 2 Saund. 606. Imp. Prac. K. B. 193. *Wright v. Walker*, 3 B. & P. 569.

(f) 15 East, 215.

(g) 13 Car. 2. c. 2. s. 3., 12 Mod. 217. R.M. 10 Geo. 2. Reg. 2. K. B. 2 T. R. 112.

will be presumed, that the declaration has not been filed or delivered to the defendant by the defendant's own default, and he will not be allowed to take advantage of his own wrong. But where the plaintiff is completely out of court, in consequence of not declaring in the original action within a year after the return of the writ, he is precluded from taking an assignment of the bail-bond.<sup>(h)</sup>

Of the forfeiture and assignment of the bail-bond.

In what stage of the proceedings an assignment may be taken.

In the Court of Common Pleas it has been decided, that the sound construction of the statute requires that the suit should be depending when the assignment is made; and it is consequently its settled practice, that if the plaintiff does not declare within two terms, that is before the essoign day of the third term inclusive, after the return of the writ, he is out of court, and cannot afterwards take an assignment of the bail-bond,<sup>(i)</sup> but even in that court the plaintiff may proceed against the bail, although the original action be out of court, if it do not appear upon the face of the proceedings, that the cause was out of court before the plaintiff actually took the assignment.<sup>(k)</sup>

It has been shewn that the 20th section of the statute <sup>(l)</sup> requires "that the assignment of the bond shall be made by endorsement on the back of the bond, under the hand and seal of the sheriff or other officer, and that it should be made in the presence of two or more credible witnesses."

Assignment how made.

Notwithstanding the words of the statute are "sheriff or other officer," it has been determined, that as the

By whom assignment may be made.

<sup>(h)</sup> *Merryman v. Carpenter*, 2 Stra. 1262. *Ditchett v. Tollett*, 3 Price, 257. *Ward v. Alderton*, Prac. Reg. 7. *Carmichael v. Chandler*, T. 24 Geo. 3. K. B. cited *Tidd*, 321.

<sup>(i)</sup> *Sparrow v. Naylor*, 2 Bl. Rep. 176. *Collet v. Bland*, 4 Taunt. 715. *Pigott v. Truste*, 3 B. & P. 221.

<sup>(k)</sup> *Collett v. Bland*, 4 Taunt. 715.

<sup>(l)</sup> 4 Anne, c. 16. s. 20.

Of the forfeiture and assignment of the bail-bond.

By whom assignment may be made.

legislature had no intention to abridge the power of the under sheriff, (*m*) the mere circumstance of the statute enjoining the assignment to be under the hand and seal of the sheriff, and prescribing the manner in which it is to be made, does not make it a personal act. It therefore appears to be clearly settled, that the assignment may be made by the under sheriff, or by a clerk in his office, (*n*) in the name of the high sheriff, as well as by the high sheriff himself. (*o*) In *Kitson v. Fagg*, (*p*) Parker, C. J. said, "He had had the advice of all his Brothers, and they were of opinion that an under sheriff himself might assign a bail-bond in the name of the high sheriff, it having been the constant practice ever since the statute 4 Anne, but that if the assignment was neither by the high sheriff nor the under sheriff, it would not be good; and that it being in the present case assigned by the under sheriff's clerk, the defendant is entitled to judgment." On the preceding case being cited, in *Harris v. Ashbey* (*q*) as an authority to shew that an assignment by one of the under sheriff's clerks was not good, Lord Mansfield was clearly of opinion, that the seal to the assignment being the seal of office, was sufficient to give it validity, whoever had signed it, and this opinion seems to accord with the usual practice. (*r*)

The sheriff, although he be out of office, may assign the bail-bond given to him, describing himself as late sheriff. (*s*)

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(*m*) An under sheriff, by virtue of his office, may be included in acts of parliament, though not expressly named, see 25 Edw. 3. c. 17. 1 F. N. B. 266.

(*n*) *Harris v. Ashbey*, MSS. cited 1 Selw. N. P. 5th ed. 572. n. 1 Tidd, 7th ed. 322, s. c. *French v. Arnold*, cited, id.

(*o*) *Kitson v. Fagg*, 10 Mod. 288. 1 Str. 60. s. c. (*p*) 1 Stra. 60.

(*q*) MSS. cited 1 Selw. N. P. 5th ed. 572. n. 1 Tidd, 7th ed. 322. s. c. *French v. Arnold*, cited, id.

(*r*) See *Middleton v. Sandford*, 4 Campb. 36.

(*s*) Forts. Rep. 364.

If the sheriff die before assignment of the bond, the plaintiff must sue as at common law, in the name of the sheriff, as the executors appear to have no authority to assign it.

Of the forfeiture and assignment of the bail-bond.

The bail-bond may be assigned out of the county for which the assignor is sheriff. (*t*)

May be assigned out of the county

The assignment is charged with a duty of 2*s.* 6*d.* (*u*) but it is sufficient if the stamp be affixed any time before the commencement of the action. (*x*)

Stamp.

When the plaintiff has taken an assignment, and instituted proceedings on the bail-bond, he is precluded from continuing the original action; (*y*) and if the bond be valid and consistent with the requisites of the statute, he cannot, after taking an assignment, rule the sheriff to return the writ; (*z*) nor if the bail to the sheriff become bail above, can the plaintiff object to their insufficiency; Accepting the assignment is an admission that they are competent. (*a*)

Effect of an assignment of the bail-bond, when taken.

## SECTION IV.

### ACTION ON THE BAIL-BOND.

A NON-PERFORMANCE of the condition of the bail-bond confers a right of action on the sheriff or his assignee, against the principal and bail, for the recovery of a sum of money, not exceeding the amount of the penalty specified in the bond.

(*t*) *Gregson v. Heather*, 2 *Stra.* 727. *Forts. Rep.* 366. s. c. 2 *Lord Raym.* 1455, s. c.

(*u*) 55 *Geo.* 3. c. 184. sched. part 11. s. 3.

(*x*) *White v. Howard*, 3 *Taunt.* 338. See precedent of such a plea in 5 *Went.* 470.

(*y*) *Eyton v. Beattie*, 2 *Smith*, 489.

(*z*) *Samuel v. Evans*, 2 *T. R.* 569. *Lord Brooke v. Stone*, 1 *Wils.* 223. *Hamilton v. Dalyrel*, 2 *Bl. Rep.* 592.

(*a*) *Anon*, 1 *Salk.* 97. *Fish v. Horner*, 7 *Mod.* 62. *Grovener v. Soame*, 6 *Mod.* 122.

Action on  
the bail-  
bond.

Instituting proceedings on the bail-bond, it has been seen, is a conclusive election, and will prevent the plaintiff proceeding in the original action. (b)

Form of  
action.

The security being an instrument under seal, the appropriate remedy is an action of debt.

By whom  
brought.

The bond may be put in suit, either by the sheriff or his assignee, and the proceedings must be commenced in the name of the former, although they are actually instituted for the sole benefit and advantage of the officer to whom the bond was given.

Against  
whom to be  
brought.

As an obligee in a joint and several bond, is in general entitled to sue the obligors, either jointly or separately, at his election, it was formerly conceived that the sheriff or his assignee had a similar right, and might bring separate suits against both the bail and the principal, and recover distinct costs against each of the parties. (c) But this practice being considered harassing and oppressive, was discountenanced in a late case. (d) The assignee of the sheriff had brought several actions against all the parties to the instrument, without suggesting any sufficient reason for the adoption of a mode of proceeding so unnecessarily expensive; it was determined, that as the statute of 4 & 5 Anne, c. 16. s. 20. had empowered the court to give such relief in actions upon bail-bonds as would be consistent with justice and equity, it might properly interpose its authority, and confine the party to such costs as were alone necessary to effectuate the real and substantial purposes of justice; and therefore made a rule absolute for staying proceedings upon payment of the costs in one of the actions. This decision, it must be

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(b) *Eyton v. Beattie*, 2 Smith, 489.

(c) *Walker v. Carter*, 2 Bl. Rep. 816. 1 Sel. Prac. 187. *Hulleck on Costs*, 2d ed. 628. *Bac. Ab. tit. Obligation*, D. 4.

(d) *Key v. Hill*, 2 B. & A. 598. 1 Chit. Rep. 337. s. c. *Abbott, C. J. dissentiente*.



observed, does not affect the right of a plaintiff to bring several actions, where the peculiar situation or circumstances of the parties would render it impolitic or inconvenient to sue them collectively; as where some of the obligors have become insolvent, or are absent from the kingdom, and cannot be served with process. In these and similar instances, separate actions may be properly instituted; and as the decision in *Key v. Hill* proceeded entirely upon the construction which the judges put upon the statute of Anne, and not on the ground, that the court could interfere in cases where that act did not constitute the foundation of the plaintiff's right, it would seem that the sheriff might still sue the bail and principal severally. (e)

Action on  
the bail-  
bond.

Against  
whom to be  
brought.

In the Court of King's Bench, the action cannot be commenced until four days after the return of the writ, if the arrest were in London or Middlesex, or until six days, if in any other county. (f) When the action is by *original*, the fourth or sixth day is computed from the *quarto die post*, and not from the return day of the writ. (g) These days are reckoned *exclusive*, and if either the fourth or sixth day happen on a Sunday, the defendant has the Monday following to put in bail, and an action cannot be commenced until Tuesday; (h) but if the time for perfecting bail expire on the last day of the term, and they are unable to justify before the rising of the court, the plaintiff may properly take an assignment of the bail-bond in the evening of that day, and immediately commence his action. (i)

At what  
time to be  
brought in  
King's  
Bench.

In the Court of Common Pleas, it is a rule (k) "that no bail-bond taken in *London* or *Middlesex*, by virtue of

At what  
time to be  
brought in  
the C. P

(e) *York v. Ogden*. 8 Price, 174.

(f) R. M. 8 Anne, 1 Impey's K. B. Prac. 190.

(g) Anon. Loft. 190. *Frampton v. Barber*, 4 T. R. 377.

(h) *Bullock v. Lincoln*, 2 Str. 914,

(i) *Paradice v. Holiday*, Barnes, 77. *Dent v. Weston*, 8 T. R. 4. See ante, p. 217.

(k) 1 H. Bl. 526. 1 Crompt. Pr. 57.

Action on  
the bail-  
bond.

At what  
time to be  
brought in  
C. P.

any process, returnable on the first return of any term, shall be put in suit until *after the fifth day of full term*; and that no bail-bond taken in any other city or county, by virtue of such process, shall be put in suit until after the ninth day in full term; and that no bail-bond taken in *London or Middlesex*, by virtue of any process returnable on the second, or any other subsequent return of the term, shall be put in suit until after the end of *four days*, exclusive of the day on which such process shall be expressed to be returnable; and that no bail-bond taken in any other city or county, by virtue of such last-mentioned process, shall be put in suit until after the end of *eight days*, exclusive of the day on which such last mentioned process shall be expressed to be returnable, upon pain of having all proceedings made upon such bail-bonds to the contrary thereof, set aside with costs."

At what  
time to be  
brought  
in the  
Exchequer.

In the Court of Exchequer, no bail-bond taken in London or Middlesex can be put in suit until *four days*, exclusive, after the return of the writ. And no bail-bond taken elsewhere, can be put in suit until after *eight days*, exclusive of the return-day of the process; and all proceedings to the contrary will be set aside with costs. (l) In computing the *four or eight days*, within which bail above ought to be put in, upon process returnable on the essoign day of the term, the *first day* of full term is reckoned as one of the four or eight days.

In what  
court.

As the act of parliament (m) which directs that the bail-bond shall be assigned to the plaintiff, confers on the court in which that instrument is put in suit an equitable jurisdiction over the proceedings, by enacting that "such relief shall be given in a summary manner to the plaintiff, the defendant, and to the bail, as is agree-

(l) 1 Burt, 120. Manning's Ex. Prac. 122.

(m) 4 & 5 Anne, c. 16.

able to justice ;” it is material, in order that the judges may be cognizant of the proceedings in the former suit, and more competent to afford the relief intended by the legislature, that the action by the assignee should be brought in the court in which the original cause was depending ;(m) unless some special circumstances can be suggested to warrant a departure from the rule, as the nonresidence of the defendant within the limits of a particular local jurisdiction. (n) If the original action be instituted in an inferior court, the action upon the bail-bond must, notwithstanding, be brought there, as in the palace court, (o) or in a county palatine, (mm) or even if one of the bail be an attorney of another court.(nn)

Action on  
the bail-  
bond.

In what  
court.

But when the action is brought by the sheriff, it is clearly established that he is not confined to the court in which the original cause was depending. (oo) The distinction between the right of the sheriff, and his assignee, in this respect, is derived from the consideration that the former is not within the statute of Anne, as he was entitled at common law, independently of the act, to sue on the bond, when forfeited, in the same unrestricted manner as an obligee may sue an obligor on a common and ordinary money bond ; but the latter deriving his right of action entirely from the statute, he can only make that right available by submitting to the restrictions imposed by the legislature, and institute his pro-

(m) *Chesterton v. Middlehurst*, 1 Bur. 643. *Walton v. Bent*, 3 id. 1923. *Frances v. Taylor*, Barnes, 92. *Morris v. Rees*, 3 Wils. 348. 2 Bl. Rep. 838. s. c. *Dixon v. Heslop*, 6 T. R. 365. *Donatty v. Barclay*, 8 id. 152. *Yorke v. Ogden*, 8 Price, 174. See *Wright v. Walmsley*, 2 Campb. 396. *Collett v. Bland*, 4 Taunt. 715.

(n) *Chesterton v. Middlehurst*, 1 Burr. 643.

(o) *Dixon v. Heslop*, 6 T. R. 365. *Donatty v. Barclay*, 8 id. 152.

(mm) *Chesterton v. Middlehurst*, 1 Burr. 643.

(nn) *How v. Bridgewater*, Barnes, 117.

(oo) *Newman v. Faucitt*, 1 H. Bl. 631. *Yorke v. Ogden*, 8 Price, 174.

Action on  
the bail-  
bond.

In what  
court.

ceedings subject to the equitable interposition of the court. (p)

The irregularity of an assignee suing in a different court from that in which the original action was commenced, cannot be taken advantage of under a plea of *non est factum*; (q) but a summary application may be made to the court to set aside the proceedings, (r) or the defendant may plead to the jurisdiction in abatement, (s) or demur generally to the declaration. (t)

Of the  
process.

As neither the bail nor principal can be arrested (u) on the bond, common process only can be issued and served upon them.

#### *Of staying and setting aside Proceedings on the Bail-bond.*

The principal and bail on being served with process, may obtain a rule of court or a judge's order in vacation, to stay proceedings on the bail-bond, upon certain known and established conditions; or if there has been any irregularity in the original process, or subsequent steps in the cause, or in the bail-bond, or in the assignment, or in any of the ulterior proceedings, they will be set aside, upon application to the court, with costs.

Of staying  
proceedings.

It may be stated as a general proposition, that proceedings on the bail-bond (although unexceptionably regular) will be stayed, in all cases where it can be shewn that the plaintiff is capable of being placed in as good a situation as he would have been in, provided the defendant had not been guilty of the laches attributed to him; but before an application can be made to the court for indul-

(p) See *Donatty v. Barclay*, 8 T. R. 153, and the observation upon this case by the Lord Chief Baron, in 8 Price, 177.

(q) *Wright v. Walmsley*, 2 Campb. 396.

(r) *Id.*, and see *York v. Ogden*, 8 Price, 176.

(s) *Ante*, p. 32.

(t) *Id.*

(u) *Id.*

gence in behalf of the bail to the sheriff, it is invariably required, as a preliminary condition, that bail above should be put in and perfected in the original action. (x) Putting in and giving notice of bail without justifying, will not authorize the parties to apply to the court for assistance; (y) and the mere circumstance of an exception not having been duly entered, will not dispense with the justification of the bail previous to an application being made to stay the proceedings. (z).

Action on  
the bail-  
bond.

Of staying  
proceedings

Where the defendant has been guilty of neglect in not putting in bail in due time, by which the bond becomes forfeited, the notice, in case the party intends to put in bail (in order to stay the proceedings upon the bail-bond) should be, that he will put in and perfect bail on a particular day, when the plaintiff may oppose the justification, without its operating as a waiver of his right to sue on the assignment.

Bail above being perfected, the court should be moved in term time, or an application made to a judge in vacation, for a rule or order to stay proceedings on the bail-bond on payment of costs, and that all proceedings in the mean time should be suspended. (a) The motion must be founded on an affidavit, stating the particular ground on which the party applying claims a right to the indulgence of the court. In the Common Pleas and Exchequer, two days' notice should be given to the plaintiff's attorney, or clerk in court, of the intended motion, which should conclude thus: "And why in the mean time all proceedings should not be stayed;" otherwise these words will not be allowed to be added to the rule. (b) The

Application  
to stay pro-  
ceedings,  
how made.

(x) 2 Wils. 6.

(y) *Turner v. Cary*, 7 East, 607. See *Allingham v. Flower*, 2 B. & P. 246.

(z) *Id.*

(a) *Swayne v. Crammond*, 4 T. R. 170.

(b) *Imp. C. P.* 197, 198. 1 *Manning's Ex. Prac.* 131.

Action on  
the bail-  
bond.

Application  
to stay pro-  
ceedings,  
how made.

Affidavit of  
merits, &c.

application to stay proceedings may be made on the same day the bail justify; (c) and in practice, it is usual to draw up the rule for the allowance of the bail with the rule or summons for staying proceedings, and serve them both at the same time.

: Prior to a late rule of court, it was considered as a doubtful position in the King's Bench, whether that court upon an application to stay proceedings, would require either an affidavit of merits, or an affidavit that the application was made on behalf of the sheriff, or the bail without indemnity from, or collusion with the defendant in the original cause; (d) but it is now ordered, "That no rule shall be drawn up for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded upon an affidavit of merits, (or if made on the part of the sheriff, or bail, or any officer of the sheriff,) be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, (as the case may be) at his or their own expense," and for his or their only indemnity, and without collusion with the original defendant. (e) When an affidavit of merits, pursuant to this order, is produced, it is not necessary that it should state on whose behalf the motion is made; (f) and regular proceedings on the bail-bond cannot be set aside, where the motion is made on behalf of the defendant, without an affidavit of merits, although the plaintiff may

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(c) *Shawe v. Johnston*, 2 Chit. Rep. 108.

(d) *The King v. the Sheriff of Middlesex*, 3 M. & S. 299.

(e) R. M. 59 Geo. 3. K. B. 2 B. & A. 240. 1 Chit. Rep. 572. See *the King v. the Sheriff of Middlesex*, 3 M. & S. 299. *The King v. the Sheriff of Surrey*, 7 T. R. 239.

(f) *Bell v. Taylor*, 1 Chit. Rep. 572.

have opposed the justification of the bail, and received the costs incident to the opposition. (g)

The affidavit of merits must appear to have been made by the defendant, or his attorney or agent; (h) a third person deposing to merits, without describing his relative situation with the litigating parties, will be unavailable. The statement, that the defendant has a good defence on the merits, should be express and positive. An allegation that the deponent "thinks in his own mind that he has a good defence," (i) or "advised that he has good defence," (k) or "believes he has a good defence," omitting to state the words "upon the merits," is insufficient. (l)

In the Court of Common Pleas, in support of a motion to stay proceedings on the bail-bond, on payment of costs, an affidavit of merits is not required, nor does there appear to be any distinction in this respect, whether the plaintiff has been impeded in proceeding to trial by the laches of the defendant or not. (m)

In the Exchequer, when a trial has not been lost, the court or a baron in vacation, will stay the proceedings on payment of costs, on the defendant putting in and perfecting bail above, without requiring an affidavit of merits, or that the application is made in case of the sheriff or bail; nor will they order the bail-bond in such case, to stand as a security, but only require that the plaintiff shall be put in the same situation as if the bail had justified in due time. (n)

Action on  
the bail-  
bond.

Staying  
proceedings.  
Affidavit of  
merits, &c.

(g) *Hilton v. Jackson*, 1 Chit. Rep. 677. See *Merryman v. Quibble*, id. 128.

(h) *Morris v. Hunt*, 1 Chit. Rep. 97.

(i) Anon. M. T. 1822. K. B. MS.

(k) Anon. id.

(l) *Pringle v. Marsack*, 1 D. & R. 155. See *Burford v. Holloway*, 2 id. 362. See *Crawley v. Impey*, 8 Taunt. 408.

(m) *Hardisty v. Storer*, 1 N. R. 123.

(n) See *Ditchett v. Tollett*, 3 Price, 257. *Walker v. Mapowder*, 8 Price, 610.

Action on  
the bail-  
bond.

Terms on  
which pro-  
ceedings  
will be  
stayed.

The affidavit and rule, or order to stay proceedings, should be entitled in the original cause, and not in the action on the bail-bond. (o)

The nature of the conditions imposed by the courts on suspending the proceeding on the bail-bond, depend entirely on the question whether a "trial or a term" has or has not been lost. Either of these technical expressions signify that the plaintiff through the neglect of the defendant to put in and perfect bail above, has been prevented from trying his cause in, and obtaining judgment of the term in which the writ was returnable. (p)

Where the plaintiff has not lost a trial, the proceedings will be stayed as a matter of course, on submitting to the terms of putting in and perfecting bail above, and paying the costs incurred by the assignment of the bail-bond, to be taxed by the Master in King's Bench and Exchequer, or the Prothonotary in the Common Pleas, and if the state of the cause require it, consenting to receive a declaration in the original action pleading issuably, and taking short notice of trial, so that the cause may be tried within the same term, if the venue be laid in London or Middlesex, or at the next assizes if laid in any other city or county. (q) But it is an inflexible rule, when a trial or a term has been lost through the negligence of the defendant, not only to impose the preceding conditions, but in addition to re-

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(o) *Webb v. Mitchell*, cited 1 Tidd, 326. 7th edit. *Smithson v. Thomas, Barnes*, 94. Wils. 461. s. c. *Winder v. Wood*, 3 B. & P. 118. *Ham v. Philcox*, 1 Bing. 142. In *Kelly v. Wrother*, 2 Chit. Rep. 109. it is reported to have been held that the affidavit in support of a rule to set aside proceedings by assignee of bail-bond, may be entitled either in the original action or in the action on the bail-bond.

(p) *Hill v. Bolt*, 4 T. R. 352. n. a.

(q) *Adams v. Thompson*, 2 Smith, 43. See *Williams v. Waterfield*, 1 B. & P. 334. *Meysey v. Carnell*, 5 T. R. 534.



quire the bail to consent that the bail-bond shall stand as a security for the plaintiff's debt and costs. And in this respect there is no distinction in principle between an application to stay proceedings upon the bail-bond, on the ground of the defendant having been surrendered, and an application of the same nature, founded on the suggestion of the defendant having put in and perfected bail; for in both instances the plaintiff has the security of the defendant's body, in the one he is within the walls of the prison, and in the other he is in the custody of the bail; hence it has been determined that the bail-bond must stand as a security, where a trial has been lost through the laches of the bail, notwithstanding the principal may have been rendered. (*r*)

Action on  
the bail-  
bond.

Terms on  
which pro-  
ceedings  
will be  
stayed.

The rule "that the bail-bond shall remain as a security when a trial has been lost," means such a trial as would have entitled the plaintiff to judgment of the same term; it does not therefore apply to actions by original, where the distringas could not be returnable until the next term, being only returnable on a general return day; but the court considered it reasonable that the defendant should take short notice of trial for the sittings after term, and on these conditions made the rule absolute. (*s*)

When the bail-bond is ordered to stand as a security, an opportunity is afforded to the bail of trying the merits of the cause; but by obtaining this indulgence, an additional responsibility is incurred, as they are under such circumstances assimilated to bail in error, and cannot surrender their principal, nor be discharged by his bankruptcy and certificate; (*t*) but even in this case, their

(*r*) *Whitehead v. Phillips*, 2 B. & A. 585. 1 Chit. Rep. 270.

(*s*) *Rex v. the Sheriff of London*, 1 Chit. Rep. 357.

(*t*) 1 Sel. Prac. 183. *Hill v. Bolt*, 4 T. R. 352.

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liability is confined to the sum specified as the penalty in the bond, although the debt and costs may exceed the amount of the stipulated forfeiture. (u).

As the question, whether or not the bail-bond shall stand as a security, depends upon the fact, whether a trial has been lost, it is incumbent on the plaintiff, who endeavours to qualify the general practice, to shew by affidavit that the declaration was delivered in sufficient time, to have gone to trial within the term; (x) and therefore, where it appeared that the defendant had proposed to pay the costs incurred by proceeding on the bail-bond, to plead to the action, accept short notice of trial, and justify at chambers, and the plaintiff had refused to accede to this proposition, the court were of opinion that these circumstances were sufficient to dispense with the usual condition of ordering that the bail-bond should stand as a security, as the plaintiff might have proceeded to trial, if he had consented to equitable terms. (y).

It appears formerly to have been considered, that where the proceedings on the bail-bond were suspended, on the condition of that instrument standing as a security, the plaintiff, on obtaining a verdict in the original action, might immediately enter up judgment against the bail; (z) but this practice is incompatible with the usual language of the rule or order; and it has been since determined,

(u) 2 Smith, 354.

(x) *The King v. the Sheriff of Surrey*, 5 Taunt. 606.

(y) *Walker v. Mapowder*, 8 Price, 610. See *Hutchinson v. Hardcastle*, Barnes, 103.; the practice originally was, that the plaintiff should declare *de bene esse*. *Ward v. Alderton*, Prac. Reg. 71.; but it was afterwards decided not to be necessary 2 Stra. 1262. 1 Sel. Prac. 183. According to the *King v. the Sheriff of Surrey*, and the present practice in the King's Bench, the plaintiff must shew that he declared as soon as in his power. See also 1 Chit. Rep. 357.

(z) *Otway v. Cokayne*, Barnes, 85. 1 Burt. 121.

that the bail are at liberty to plead to the action on the bail-bond, and are consequently entitled to a rule to plead and demand of a plea, when they have appeared to the action on the bail-bond, before judgment can be signed against them. (a)

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After proceedings have been stayed on the bail-bond, the defendant is precluded from pleading in abatement to the original action; (b) and when two only of three joint contractors were sued, the court refused to suspend the proceedings, unless the defendant would undertake not to avail himself of the nonjoinder. (c)

As soon as the rule to stay the proceedings is made absolute or a judge's order obtained upon the summons, it is incumbent on the defendant to obtain an appointment from the Master in the King's Bench or Exchequer, or from the Prothonotaries in the Common Pleas, to tax the costs, and to serve a copy of it upon the plaintiff's attorney or clerk, in court, and to tax and pay the costs without delay, otherwise the rule or order will not operate as a stay of proceedings. (d) When separate suits are brought against the bail and principal, without a sufficient reason being assigned, it has been already mentioned, that the court will stay the proceedings in all the actions upon payment of the costs in one. (e)

If one of the bail apply to stay proceedings, it will only be granted upon payment of the costs incurred against the other, as well as against the principal. (f)

(a) *Evans v. Surman*, 1 N. R. 63.

(b) Anon. 2 Salk. 519. *Goss v. Harrison*, T. Geo. 3. 44. K. B. cited 1 Tidd, 323. n. b.

(c) *Govett v. Johnson*, 2 B. & P. 465.

(d) Imp. K. B. 152. 1 Sel. Prac. 201. 1 Tidd, 327, 7th ed. 1 Manning's, Ex. Prac. 133.

(e) *Key v. Hill*, 2 B. & A. 592. 1 Chit. Rep. 337. s. c. See ante, p. 222.

(f) *Walker v. Carter*, 2 Bl. Rep. 816.

Action on  
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(b) Anon. 2 Salk. 519. *Goss v. Harrison*, T. Geo. 3. 44. K. B. cited 1 Tidd, 323. n. b.

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(e) *Key v. Hill*, 2 B. & A. 592. 1 Chit. Rep. 337. s. c. See ante, p. 222.

(f) *Walker v. Carter*, 2 Bl. Rep. 816.

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the bail-  
bond.

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which pro-  
ceedings  
will be  
stayed.

The mode and time of making an application to stay the proceedings on the bail-bond, and the terms on which that indulgence will be granted, having been considered, it will be necessary to examine the general grounds on which the courts, as a matter of right, will relieve the parties. Premising as a general rule, that whenever it can be shewn, from the peculiar nature of the case, or from the circumstance of the intended defence to the original action *having merits*, that the bail are entitled to indulgence, it will invariably be extended to them on submitting to such terms as the court may deem it expedient to impose. The following are the principal grounds on which these applications are made:

*A mistake in putting in and justifying bail.*

*Render of principal.*

*Bankruptcy of principal.*

*Death of principal.*

*Principal sent out of the kingdom under Alien Act.*

*Payment of the original debt and costs.*

Mistake in  
putting or  
justifying  
bail.

If the bail-bond be assigned, and the plaintiff proceed upon it, owing to some mistake or inadvertence on the part of the defendant in putting in bail or the like, the court will stay the proceeding upon payment of costs, and order the mistake to be rectified. (g) As where the plaintiff had taken an assignment of the bail-bond, and had afterwards given notice of exception to the bail, without entering it, it was determined that the plaintiff's irregularity in not entering an exception, was not waived by defendant's having given two notices of justification, under one of which the bail had justified, and that the proceedings on the bail-bond should be stayed. (h)

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(g) *Garnett v. Heaviside*, Barnes, 63: See *Hutchinson v. Hardcastle*, id. 103.

(h) *Hodson v. Garrett*, 1 Chit. Rep. 174. In the court of Common Pleas, notice of a justification of bail is a waiver as between the par-

After render of the principal, the proceedings on the bail-bond will be either set aside or stayed, according to the fact, whether the render was affected anterior or subsequent to the return of the writ. The cases connected with the latter part of the proposition, will here only be examined. The decisions applicable to the former, will be postponed until we treat of setting aside the proceedings. It may be stated as a fundamental rule, that rendering the defendant into custody, is equivalent to perfecting bail. (i) And as the courts will in general stay the proceedings on the bail-bond, after bail above have been put in and allowed, it seems quite clear that the bail to the sheriff may divest themselves from the continuance of their liability, by rendering the defendant and applying to the court to stay the proceedings on the bail bond, on payment of the costs incurred by the plaintiff in suing on the instrument; or if a trial has been lost, by acquiescing in the further condition, that the bail-bond shall stand as a security, notwithstanding the render. (k) To enable the bail to the sheriff to obtain this relief, bail above should be previously put in; but it is not necessary that they should either justify, or be allowed. In the King's Bench, bail who have been rejected are competent to surrender their principal, while their names remain upon the bail-piece; and where one bail only had justified, and time had been refused by the court to justify another, the render was considered to be sufficient. (l)

Action on  
the bail-  
bond.

Staying pro-  
ceedings.  
After  
render of  
principal.

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ties, of a neglect to give notice of exception, though it is not a waiver with respect to the sheriff, so as to support a rule to bring in the body, *Cohn v. Davis*, 1 H. Bl. 80. *Rogers v. Mapleback*, 1 H. Bl. 106.

(i) *Chadwick v. Battye*, 3 M. & S. 283. *Harford v. Harris*, 4 Taunt. 669.

(k) *Phillips v. Witchard*, 1 Ch. Rep. 270. See *id.* note (a). *Hill v. Bolt*, 4 T. R. 852.

(l) *Anon.* 1 N. R. 138. n. a. *The King v. the Sheriff of Essex*, 5 T. R. 633. *Id.* 683. *Wiggins v. Stephens*, 5 East, 525. *Farquharson v.*

Action on  
the bail-  
bond. .

Staying  
proceedings,  
After  
render of  
principal.

In the Common Pleas, the practice is different; for although in that court any bail are in general sufficient to make a surrender, yet bail who have been rejected are considered as no bail, and cannot therefore surrender the defendant; but fresh bail may be put in, and before any exception has been taken to them, they may render the defendant: and even in the Common Pleas, it is clear that for this purpose the bail need not justify.<sup>(m)</sup> In *Bell v. Gate*,<sup>(n)</sup> Mr. Justice Heath observed, that bail, after they had been rejected, might enter into a new recognizance, for the purpose of making the render; and that any person whatsoever, even if they came from Newgate, might become bail for that purpose. <sup>(o)</sup>

Bail surreptitiously put in have been holden incompetent to surrender the defendant. <sup>(p)</sup> And when the rule for the allowance of bail was discharged on account of perjury in one of the bail, and pending the motion for setting aside the allowance the defendant was rendered, the Court of K. B. decided, that the plaintiff might, notwithstanding the render, proceed on the bail-bond.<sup>(q)</sup> The application to stay proceedings after render of the principal, upon payment of costs incurred by the laches of the bail, and submitting to such other terms as the court, from the state of the cause, may deem it expedient to impose, may

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*Fouchecour*, 16 East, 387. *Edwin v. Allen*, 5 T. R. 401. *Meysey v. Carnell*, id. 534. *Rex v. Sheriff of Middlesex*, 7 id. 527. *Hall v. Walker*, 1 H. Bl. 638. *Seaver v. Spraggon*, 2 N. R. 85. *Bell v. Gate*, 1 Taunt. 163. See *Hardwicke v. Bluck*, 7 T. R. 297. *Mills v. Head*, 1 N. R. 138. *Turner v. Wheatley*, 1 Price, 262. *semb. contra.*

<sup>(m)</sup> 3 Wils. 59. *Mills v. Head*, 1 N. R. 137. *Hall v. Walker*, 1 H. Bl. 638. *Seaver v. Spraggon*, 2 N. R. 85.

<sup>(n)</sup> 1 Taunt. 163.

<sup>(o)</sup> See *Holward v. Andre*, 1 B. & P. 32. *Jackson v. Morris*, 2 Bl. Rep. 1179.

<sup>(p)</sup> *Jackson v. Morris*, and *Richardson v. Morris*, cited in 2 Bl. Rep. 1179.

<sup>(q)</sup> *Brown v. Gillies*, 1 Chit. Rep. 496.



be made, either pending the suit, or after execution levied, and the money is in the sheriff's hands. (r) When notice of the render has been given, before the assignment of the bond, the proceedings will be stayed without costs. (s)

Action on  
the bail-  
bond

Staying  
proceedings.

If the defendant become bankrupt after he has given a bail-bond, the bail are not discharged, unless he obtain his certificate before the bond is forfeited; when he acquires it afterwards, they remain liable to the same extent, as if the bankruptcy had not occurred. (t) Where a commission had issued against defendant after the commencement of the action, and he had obtained his certificate, but had omitted to plead it in bar, and judgment was consequently signed for want of a plea, and the plaintiff then proceeded against the bail; the court decided that they could not relieve the latter on motion: nor does it appear that under such circumstances, the bail could in any way take advantage of the bankruptcy and certificate of their principal. (u)

After  
bankruptcy  
of principal.

When the original defendant is discharged under an insolvent act, before a forfeiture of the bail-bond has been incurred, it seems the bail would be entitled to the same indulgence as in the case of bankruptcy. (x)

The court will not relieve the sheriff's bail, upon the death of the defendant in the original action, where the plaintiff might have had judgment against him, (y)

After  
death of  
principal.

(r) *Manning v Turner*, 8 Mod. 280. *Lepine v. Barrat*, 8 T. R. 223. *Anon.* 2 Chit. Rep. 103.

(s) *Anon.* 2 Chit. Rep. 103.

(t) *Sanders v. Spincks*, Barnes, 105. *Woolley v. Cobbe*, 1 Burr. 241. *Cockerill v. Owrton*, id. 436. *Clarke v. Hoppe*, 3 Taunt. 46.

(u) *Clarke v. Hoppe*, 3 Taunt. 45. For other cases on this subject, vide post.

(x) — v. *Brice*, 2 Chit. Rep. 105.

(y) *Orton v. Vincent*, Cowp. 71. *Morley v. Carr*, Barnes, 112.

Action on  
the bail-  
bond. \*

Staying  
proceedings.  
After  
death of  
principal.

if bail above had been put in and perfected in due time; but if the defendant die before the plaintiff could possibly have obtained judgment, (z) supposing that bail above had been regularly put in and perfected, the court will stay proceedings on the bail-bond, on payment of costs only. So, if the plaintiff in the original action die before judgment could have been recovered therein, the proceedings on the bail-bond may be stayed on payment of costs; (a) but if the death did not happen till after judgment might have been obtained, his executor may proceed on the bail-bond, and the bail, in order to obtain a stay of the proceedings, must pay both the debt and costs. (b)

After the  
principal is  
sent out of  
the king-  
dom.

If the defendant be a foreigner, and is sent out of the kingdom under the alien act, before the return of the writ, the court will order the bail-bond to be delivered up to be cancelled; (c) and a motion for this purpose may be made without the usual preliminary step of putting in bail above, as this proceeding would be nugatory; it being in the power of the bail to apply immediately to the court to enter an exoneration on the bail-piece. (d) When the principal has been convicted of felony, and sentenced to transportation, it would appear that the same indulgence would be extended towards the bail, as where the defendant is sent out of the country under the legislative provisions respecting aliens. (e)

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(z) *Heath v. Astley*, Barnes, 61. *Morley v. Carr*, id. 112.

(a) *Willoughby v. Rhodes*, Barnes, 70. *Nutkins v. Wilkin*, Barnes, 96.

(b) See 8 Mod. 240.

(c) *Postell v. Williams*, 7 T. R. 517. See *Merrick v. Vaucher*, 6 id. 50. *Coles v. Hayne*, id. 52. *Folkein v. Critico*, 13 East, 457.

(d) *Postell v. Williams*, 7 T. R. 517.

(e) *Wood v. Mitchell*, 6 T. R. 247. See 7 T. R. 226. 4 East, 189. 7 id. 405. 15 id. 78.

The proceedings will also be stayed upon bringing into court the principal debt, interest, and costs. (*f*)

In many of the foregoing cases the proceedings have been perfectly regular, and the suit against the bail has been only temporarily suspended to afford the parties an opportunity of trying the merits of the original action; but where the plaintiff is chargeable with any deviation from the established rules of practice, either in the process issued against the original defendant, or proceedings subsequent thereto, or in the bail-bond, or in the assignment, or ulterior steps in the cause against the bail, the proceedings will be set aside, and in general, with costs.

The application for setting aside the proceedings should be by motion to the court, founded upon an affidavit stating the nature of the irregularity committed, and when it consists in a defect apparent upon the process or other written document, a copy of the defective instrument should be annexed to the affidavit. (*g*) The application should be preceded by notice to the plaintiff's attorney of the intended motion, and the person serving it should be able to make an affidavit of its having been duly delivered. If the court be satisfied from the depositions adduced, that the proceedings have been irregularly conducted, they will grant a rule nisi, and afterwards, if sufficient cause be not shewn, will make it absolute. Obtaining a rule nisi, operates as a stay of the proceedings for all purposes until it is discharged. (*h*) When the rule is made absolute it is always with costs, unless some satisfactory reason be laid before the court to induce them to depart from the general practice, and if the rule is discharged it is considered to be discharged with costs,

Action on the bail-bond.

After payment of principal debt, &c. Of setting aside proceedings.

Of setting aside proceedings.

(*f*) *Butler v. Rolls*, 3 Salk. 55. *Walker v. Carter*, 2 Bl. 816.

(*g*) *Imp. K. B.* 197. 8th edit.

(*h*) *Swayne v. Crammond*, 4 T. R. 176.

Action on  
the bail-  
bond.

Of setting  
aside pro-  
ceedings.

unless special directions be given by the court to the contrary. (i)

The rule of court in the King's Bench requiring an affidavit of merits, when the application is made on behalf of the original defendant, or if made on the part of the bail, an affidavit shewing that such application is really made on the part of the bail, does not apply to cases when the motion is for irregularity, but merely to applications to stay proceedings regularly commenced on the assignment of the bail-bond. (k)

In entitling the affidavits and rule, there is a distinction between motions founded upon some defect in the proceedings in the action against the original defendant, and an irregularity in the action against the bail; in the former they should be entitled in the original suit, (l) in the latter in the name of the cause against the bail. (m)

The motion to set aside proceedings on the bail-bond, either on the behalf of the bail, or the defendant in the original action, should be made as early as possible, (n) for where the party complaining, after being apprized of the irregularity takes further steps in the cause, he cannot afterwards revert back to the irregularity, and object on that ground to the proceedings; (o) and it is a rule in the King's Bench, to refuse motions to set aside pro-

Within  
what time  
application  
must be  
made.

(i) Reg. Gen. M. T. 37 Geo. 3., 7 T. R. 82.

(k) Vide ante, p. 228.

(l) Webb v. Mitchel, 48 Geo. 3. K. B. cited 1 Tidd, 326. n. f. Ham v. Philcox, H. T. 4 Geo. 4. C. P. MS. See Winder v. Wood, 3 B. & P. 118. Barlow v. Kaye, 4 T. R. 689. Kelly v. Wrother, 2 Chit. Rep. 109.

(m) Webb v. Mitchell, M. 48 Geo. 3. K. B. 1 Tidd, 326. n. g. Willes, 461. s. c. Roberts v. Giddins, 1 B. & P. 337. In Blackford v. Hawkins, H. T. 2 Geo. 4. the Court of Common Pleas said, that rule stated in the text should be invariably enforced. Ham v. Philcox, H. T. 4 Geo. 4. C. P. MS. 1 Bing. Rep. 142. s. c.

(n) Petrie v. White, 3 T. R. 7. D'Argent v. Vivant, 1 East, 335.

(o) 1 Tidd, 534.

ceedings for irregularity, even though no new step has been taken in the cause, unless the application is made within a reasonable time. (p)

Action on  
the bail-  
bond.

Of setting  
aside pro-  
ceedings.

But in the Court of Common Pleas, the party is not obliged to move to set aside the proceedings within a limited or even reasonable period. In that court, some step subsequent to the irregularity must be taken by the plaintiff, plainly indicating that he intends to continue the proceedings which he has erroneously commenced, before the delay of the defendant or the bail will be construed into a waiver of the irregularity. As soon, however, as a further step has been taken, application should be made to set the proceedings aside. (q)

In the Court of Exchequer, all motions to annul proceedings on the ground of irregularity, must be made in the term in which the irregularity is committed. (r)

Although in all the courts, a mere irregularity may be waived by the adverse party, a complete defect or omission in the proceedings cannot. (s)

The above are the general rules respecting the time within which an application to set aside irregular proceedings should be made. The exceptions to them will be noticed, while stating the particular causes for which the proceedings may be annulled; and as they are numerous, it may be useful to subjoin the following analysis:

(p) 1 Tidd, 534. n.

(q) *Fletcher v. Wells*, 6 Taunt. 191. 1 Marsh. 550. s. c. and see *Young v. Wilson*, 5 Taunt. 664. *Ledwich v. Prangnell*, 1 Moore, 299. *Dand v. Barnes*, 6 Taunt. 5. 1 Marsh. 403. s. c. *Forrest*, 31. *Harris v. Mullet*, 1 Taunt. 59. *Downes v. Witherington*, 2 Taunt. 243. *Jemmet v. Voyer*, Prac. Reg. 355. *Barnes*, 296. s. c. 1 Chit. Rep. 14. n. b. See also *Fox v. Money*, 1 B. & P. 250. *Gehegan v. Harper*, 1 H. Bl. 251.

(r) 3 Price, 37. Anon. 5 Price, 610.

(s) *Hussey v. Wilson*, 5 T. R. 254. Anon, Easter T. 1823. MS.

Action on  
the bail-  
bond.

Of setting  
aside pro-  
ceedings.

1st. *For proceeding irregularly against the original defendant.*

*Without affidavit of debt, or on an insufficient affidavit.*

*A defect in the process.*

*Misnomer of Defendant.*—Name of one of the parties omitted.—Writ tested out of term, or returnable on an improper day, or misdirected.—Attorney's name not endorsed on the process.—Variance between the first, and subsequent writs.—Variance between writ and bail-bond.

*Defendant privileged from arrest.*

*Declaration at variance with the affidavit or process.*

2d] *For proceeding irregularly against the bail:*

*Defect in the process.*

*In bringing the action* { *Before forfeiture.*  
*After taking a cognovit from principal.*  
*After render of principal.*  
*After death of principal.*

1st. For proceeding irregularly against the original defendant, without affidavit, or on an insufficient affidavit.

If the defendant has been arrested without an affidavit of debt having been made previously thereto, and filed with the proper officer, (*t*) or a judge's order, when necessary, obtained, (*u*) or if the affidavit to hold to bail be informal or defective in any material part, (*x*) the bail-bond will be ordered to be delivered up to be cancelled, and the proceedings set aside. The application for this purpose should be made in an early stage of the cause, as it is clearly settled that the affidavit cannot be objected to after bail has been perfected, (*y*) or even put in, (*z*) or after plea, (*a*) or judgment by default and notice of executing a writ of inquiry, (*b*) or after the defendant has, without being arrested, voluntarily given a bail-

(*t*) 12 Geo. 1. c. 29. s. 2. 2 Wils. 225. vide ante, p. 139.

(*u*) Ante, p. 317. (*x*) Ante, p. 139.

(*y*) Jones v. Price, 1 East, 81. Chapman v. Snow. 1 B. & P. 132.

(*z*) D'Argent v. Vivant, 1 East, 330. 6 Taunt. 185.

(*a*) Norton v. Danvers, 7 T. R. 376. n.

(*b*) Desborough v. Copinger, 8 T. R. 77.

bond. (c) But what has here been said must be understood as only applicable to proceedings which are merely irregular, for if the affidavit be a nullity, the defect is not waived, by any subsequent proceeding of the defendant; hence, where the maker and endorser of a note were both arrested on one affidavit, the defect was considered not to be waived by putting in bail. (d)

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings.

Misnomer

Formerly the courts would not set aside the proceedings upon a bail-bond on account of a misnomer; (e) but it seems now to be the established practice, that if a defendant be arrested by a wrong christian or surname, (f) the court, if the name be not *idem sonans*, (g) or the wrong christian name signed by the defendant in his dealings with the plaintiff, (h) will order the bail-bond to be delivered up to be cancelled, provided the application be made before the time for pleading in abatement has expired, and the defendant will undertake not to bring an action. (i) But it is clear from *Smith v. Patten*, (k) and *Binfield v. Maxwell*, (l) that if the defendant when sued by a wrong name omit to plead it in abatement, he cannot obtain the summary interposition of the court, it was there observed, that the court did not adopt the argument that the defendant by not noticing the misnomer had misled the plaintiff, but decided the case on the ground that the defendant might have pleaded the misnomer in

(c) *Norton v. Danvers*, 7 T. R. 375.

(d) *Hussey v. Wilson*, 5 T. R. 254. *Holland v. Bothmar*, 4 T. R. 228. See *King v. Cole*, 6 id. 640. ante, p. 149.

(e) *Salter v. Shergold*, 3 T. R. 572. *Stevenson v. Danvers*, 2 B. & P. 109.

(f) *Kitching v. Alder*, 1 Chit. Rep. 282.

(g) *Ahitbol v. Beniditto*, 2 Taunt. 401.

(h) *Walker v. Willoughby*, 6 Taunt. 530.

(i) *Smith v. Innes*, 4 M. & S. 360. *Reynolds v. Hankin*, 4 B. & A. 536. Anon. 1 Chit. Rep. 398, n.(a). But see *Salter v. Shergold*, 3 T. R. 572. *Stevenson v. Danvers*, 2 B. & P. 109! *semb. contra*.

(k) 3 Taunt. 115; s. c. 1 Marsh. 474.

(l) 15 East, 158.

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the bail-  
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Misnomer.

abatement, and not having availed himself of that opportunity he could not afterwards apply to set aside the proceedings.

When the writ stated only the initials of the defendant's christian name, thus, "E. D. Colville," the court ordered the bail-bond to be delivered up to be cancelled, although the defendant had signed the bail-bond and the promissory note on which the action was brought in the same manner; for they said E. D. was no christian name, no man was ever baptized by such a name; (*m*) and where a widow was arrested upon a bill of exchange, accepted by her in the name of W. S. Chatterley, by which name she had always gone since her husband's death, W. S. being the initials of her husband's Christian names, the court set aside the bail-bond on a common appearance being entered. (*n*)

Name of  
one of the  
parties  
omitted in  
the writ.

Writ tested  
out of term,  
or return-  
able on an  
improper  
day, or mis-  
directed.

An omission to insert either the name of the plaintiff or defendant in the process, will be sufficient to induce the court to set aside the proceedings. (*o*)

So if process by bill be tested in vacation, (*p*) or a continued writ on any other day, than the day on which the prior process was returnable, (*q*) or if the writ be made returnable out of term, (*r*) or on a day certain in

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(*m*) MS. M. 1820. 1 Archbold Prac. Add. 5. But see *Kingston v. Llewellyn*, 1 B. & B. 529. in which the defendants having signed a regular bail-bond, were held to have waived the irregularity of the omission of their christian names in a *capias ad respondendum directing the sheriff to take Messrs. L. and B.* As to two christian names being counted as one in law, see 3 M. & S. 263. 2 Hale, 175. 1 Ld. Raym. 562. 3 East, 111. 5 T. R. 195.

(*n*) *M'Beath v. Chatterley*, 2 D. & R. 237. See *Parker v. Bent*, 2 D. & R. 73. *Reynolds v. Hankin*, 4 B. & A. 536. *Tomlin v. Preston*, 1 Chit. Rep. 397.

(*o*) Andr. 16.

(*p*) *Johnson v. Smith*, 2 Burr. 954. *Hart v. Weston*, 5 Burr. 2588. 2 Bl. Rep. 683. s. c.

(*q*) *Rex v. the Mayor of Hertford*, 2 Salk. 699. See *Usher Estwick v. Cooke*, 2 Ld. Raym. 1557. *Belk v. Broadbent*, 3 T. R. 183.

(*r*) *Mills v. Bond*, 1 Stra. 399.



action by original, or on a general return day, in action by bill, (s) or on a dies non, (ss) or be misdirected.

Action on the bail-bond.

With regard to the latter proposition, it is to be observed, that if a writ which ought to be "directed" to the sheriff, be addressed to any other person, it is void, and any proceedings had under it would be viewed in the same light as if no process whatever had been sued out. (t) But if the writ be directed to the sheriff when it should have been addressed to some other officer, the execution of the writ will be valid. Hence it has been decided, that though it is informal to address process to the Sheriff of Durham direct, instead of through the intervention of the Chamberlain, the writ is not void, and a bail-bond taken thereon is good. (u)

Setting aside proceedings. Writ tested out of term, or returnable on an improper day, or misdirected.

As the statute 2 Geo. 2. c. 23. s. 22. (x) requires that every process for arrest, before it is executed, should be endorsed with the name of the attorney by whom it is sued out, it appears that an omission in this respect would invalidate the proceedings, and that the bail-bond might be cancelled. In *Oppenheim v. Harrison* (y), where an attorney named, has been subscribed on the back of the process without his authority, the court ordered it immediately to be set aside.

Attorney's name not endorsed on the writ.

A variance between the first and subsequent writs in continued process, is sufficient to render the proceedings invalid; as if a latitat be sued out against the defendant by one christian name, and the alias by another, the proceedings will be set aside. (z)

Variance between first and subsequent writs.

(s) *Furtado v. Miller*, Barnes 213.

(ss) *Kenworthy v. Peppeat*, 4 B. & A. 288.

(t) 2 Saund. 72. b.

(u) *Jackson v. Hunter*, 6 T. R. 71. *Grant v. Bagge*, 3 East, 128.

(x) See 4 T. R. 275.

(y) 1 Burr. 20., that an attorney can only in special cases give permission to another to practice in his name. See 5 Burr. 2660. 5 B. & A. 824. 1 B. & C. 270.

(z) *Corbett v. Bates*, 3 T. R. 660. *Oakley v. Giles*, 3 East, 167.

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings.  
Variance  
between  
writ and  
bail-bond.

Defendant  
privileged  
from arrest.

Although, if the bail-bond be substantially correct, it cannot be avoided for any trifling variance in the condition, from the writ in the description of the place, or time of appearance; (a) yet a material difference, it has been shewn, will avoid the bond; as where a *capias ad respondendum* was made returnable before His Majesty's Justices of the bench at Westminster, by virtue of which the sheriff issued his mandate to the bailiff of a liberty, commanding him to take the defendant, so that the sheriff might have his body before his said *Majesty at Westminster*; and the bailiff took a bail-bond conditioned for the defendant's appearance before *His Majesty at Westminster*. (b)

If the person, whose release from custody has been obtained by giving a bail-bond, is privileged from arrest, as a member of the Royal Family, (c) servant of the King, (d) exempt by writ of protection, (e) peer, (f) member of the House of Commons, (g) member of convocation, (h) ambassador (i) or his servant, (k) member of a corporation aggregate, when sued in their corporate capacity, (l) or hundredor, (m) officer of a court of justice, (n) executor or administrator, (o) heir or devisee, (p) feme covert, (q) person attending courts of justice, (r) bankrupt, when protected either by the statute 5 Geo. 2. c. 30. s. 5. (s) or by his certificate, (t) person discharged under insolvent acts, (u) seaman or mariner, (x) soldier, (y) clergyman going to or returning from church, (z) defendant arrested on a Sunday, (a) or in the King's presence or in

(a) See ante.

(b) *Renalds v. Smith*, 6 Taunt. 551. 2 March. 358 s. c.

(c) Ante, p. 41.

(d) Ante, p. 42.

(e) Ante, p. 45.

(f) Ante, p. 46.

(g) Ante, p. 49.

(h) Ante, p. 52.

(i) Ante, p. 52.

(k) Ante, p. 57.

(l) Ante, p. 65.

(m) Ante, p. 65.

(n) Ante, p. 66.

(o) Ante, p. 72.

(p) Ante, p. 73.

(q) Ante, p. 73.

(r) Ante, p. 81.

(s) Ante, p. 92.

(t) Ante, p. 109.

(u) Ante, p. 110.

(x) Ante, p. 115.

(y) Ante, p. 117.

(z) Ante, p. 121.

(a) Ante, p. 123.

one of his palaces, (b) or in a court of justice, (c) or in his own house; (d) the proceedings upon the bail-bond, if the exemption be satisfactorily established, will be set aside. (e)

Action on the bail-bond.

Setting aside proceedings. Declaration at variance with the affidavit or process.

The bail are entitled to be discharged, if the plaintiff declare for a different cause of action, from that expressed in the affidavit; as when the affidavit to hold to bail is in assumpsit and the plaintiff declare in trover; (f) and where an affidavit was made as at the suit of an endorsee against the acceptor of a bill of exchange, and it appeared by the declaration that the money was payable out of a particular fund, the court discharged the defendant on entering a common appearance. (g) But in *Gould v. Logette*, (h) where the affidavit stated the debt to be on a bill accepted by defendant, for the sum of 523*l.* 17*s.* 6*d.* and the declaration described it as a bill for 523 *livres* 17 *sous* 6 *deniers*, being of the value of 523*l.* 17*s.* 6*d.* sterling, the court held that it was no variance, the value of the money stated in the affidavit and declaration, being in substance and effect the same, the court would intend that *livres*, as mentioned in the declaration, meant *livres* sterling, and so on.

The declaration and process should correspond; for where the plaintiff is described in the writ as suing in his own right, and in the declaration as executor, the court will discharge the defendant on filing common bail, (i) or

(b) Ante, p. 125.

(c) Ante, p. 128.

(d) Ante, p. 128.

(e) See 2 Stra. 989., Fort. 159., Com. Rep. 444. s. c. 1 Wils. 278., 2 Bl. Rep. 788., 5 T. R. 689., 3 East, 89., 2 B. & A. 234.

(f) *Tetherington v. Goulding*, 7 T. R. 80.

(g) *Wilks v. Adcock*, 8 T. R. 27. See *Spalding v. Mure*, 6 T. R. 363. 2 East, 305., 3 Wils. 61., 6 T. R. 158., 2 H. Bl. 278., 2 B. & P. 358., 2 Taunt. 107., 7 id. 304., 1 Moore, 51. s. c. 1 Chit. Rep. 171.

(h) 1 Chit. Rep. 659.

(i) *Hally v. Tipping*, 3 Wils. 61. *Douglas v. Irlam*, 8 T. R. 416.

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings.  
Declaration  
at variance  
with the  
affidavit or  
process.

When two  
bail-bonds  
have been  
taken.

if the defendant be arrested as surviving partner, and is afterwards declared against not as surviving partner, but in his own right, the proceedings on the bail-bond will be set aside; (k) but if on joint process, the plaintiff declares against the parties severally, the declaration only will be set aside, and the court refused to order the bail-bond to be given up to be cancelled. (l)

Where the plaintiff had sued out two writs into two counties and arrested the defendant in both, and two bail-bonds were given, and the defendant was then apprized that no further proceedings would be taken on the second writ, the court refused to set aside the assignment of the first bail-bond, but said that it would be right that the proceedings on the second writ should be set aside, and that the plaintiff should pay the costs incurred, up to the time when he gave notice that he should not proceed on the second writ. (m)

2d. Irregu-  
larities in  
proceeding  
against the  
bail.

Any irregularity in the action against the parties to the bail-bond, will form a ground for setting aside the proceedings in the same manner as in other actions; it will, therefore, only be necessary here to point out those irregularities which may be considered as peculiar to this instrument. It has been already stated, that neither the bail nor the principal can be arrested upon the bail-bond; (n) and ifailable process be issued against them, and a bail-bond taken thereon, the courts will order it to be delivered up to be cancelled. (o)

(k) *Spalding v. Mure*, 6 T. R. 363. *Douglas v. Irlam*, 8 id. 416. *De la Cour v. Read*, 2 H. Bl. 278. See 4 B. & A. 29., id. 374., 2 Stark. 365, 2 Chit. Rep. 436., 2 Saund. 72. a.

(l) *Thompson v. Cotter*, 1 M. & S. 55. s. c. *Roger v. Jenkins*, 1 B. & P. 383.

(m) *Bullock v. Morris*, 2 Taunt. 66. Sed vide 1 Chit. Rep. 392. Anon. 2 id. 392.

(n) Ante, p. 32.

(o) *Brander v. Robson*, 6 T. R. 336. *Mellish v. Petherick*, 8 id. 450. *Prendergast v. Davis*, 8 id. 85.

If there be any irregularity in the assignment of the bail-bond, (p) or the action be improperly commenced, before a forfeiture was incurred, (q) or pending a rule to stay proceedings in the original action, (r) the proceedings on the bond will be set aside.

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings

As the plaintiff's right to sue upon the bail-bond is derived from a non-performance of the condition, any admission, that the defendant has appeared, and is properly before the court, will discharge the bail. Hence it has been declared, that taking a cognovit for the debt and costs, before a breach of the condition, will afford sufficient ground to induce the court to set aside the proceedings; or if taken after a forfeiture has been incurred, to stay them; the plaintiff in the latter case having no right to proceed, unless there be a continuing breach. (s)

Aftertaking  
a cognovit.

The defendant having given a bail-bond, could not formerly have discharged his bail to the sheriff, by surrendering himself, before the return of the writ; for it was considered as a settled and indisputable point, that nothing could be esteemed a performance of the condition, but putting in and perfecting bail above. (t) But this doctrine has since been much qualified, and it may now be stated to be a fixed and established rule of law, that if the exigency of the process be accomplished by the defendant voluntarily surrendering himself to the sheriff, (u) either on or before the return-day

After  
render of  
principal.

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(p) Vide ante, p. 215. (q) Vide ante, p. 216. (r) 4 T. R. 176.

(s) *Farmer v. Thorley*, 4 B. & A. 91. *The King v. the Sheriff of Surrey*, 1 Taunt. 159. *Bowsfield v. Tower*, 4 id. 456. *Croft v. Johnson*, 5 id. 319., 1 Marsh. 59. s. c. *Thomas v. Young*, 15 East, 617. *Brown v. Neeve*, Wightw. 121. Sed vide *Hodgson v. Nugent*, 5 T. R. 277. As to the distinction between cognovit payable by instalment and payable absolutely, see post.

(t) *Harrison v. Davies*, 5 Burr. 2683.

(u) See 1 East, 389., 6 T. R. 754.

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings.  
Render of  
principal.

of the writ, the bail-bond will be ordered to be delivered up to be cancelled, and the plaintiff must proceed against the original defendant, as if no such security had been given. (x) Upon this principle it has been determined, that an assignment of the bail-bond, taken after a render to the sheriff, would be void, (y) and that the plaintiff can neither proceed by attachment against the sheriff, nor maintain an action against him for refusing to grant an assignment. (z) When the defendant has surrendered himself, notice of that circumstance ought to be given to the plaintiff, otherwise the court will impose on the defendant the condition of paying the costs incurred anterior to his being informed of the render. (zz) And if the question of costs turn upon whether the plaintiff knew that the defendant was in custody, it will be presumed that he was ignorant of it, unless notice of that event has been regularly served. (a) It is, however, in all cases, optional with the sheriff, whether he will accept the surrender of a defendant, whom he has released on giving a bail-bond before the return of the writ; and therefore, when notice of such surrender had been given to the sheriff, and to the gaoler, in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; the court decided that the keeper of the prison was not liable upon his bond of indemnity to the sheriff, as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler, merely by virtue of the render. (b)

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(x) *Jones v. Lander*, 6 T. R. 753. *Stamper v. Milbourne*, 7 id. 122. *Hamilton v. Wilson*, 1 East, 383. *Plimpton v. Howell*, 10 East, 100. See *Turner v. Wheatley*, 1 Price, 262.

(y) *Callaway v. Seymour*, 42 Geo. 3. K. B., cited 1 Tidd, 248. 7th ed.

(z) *Id.* (zz) *Maddocks v. Bullcock*, 1 B. & P. 325.

(a) *Harding v. Hennem*, 3 B. & P. 232.

(b) *Hamilton v. Wilson*, 1 East, 382. After a defendant has been discharged out of custody upon a bail-bond, it is neither in the power

But it does not appear necessary that the assent of the sheriff should be communicated before or on the return-day of the writ; (c) for where the principal had surrendered to the gaoler of the county prison, in discharge of his bail to the sheriff, before the first day of term, being the return day to the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of seventeen miles, it was held sufficient to discharge the bail-bond, of which the plaintiff, after notice of the surrender, had taken an assignment.

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings.  
Render of  
principal.

In all the preceding cases, the render had been effected prior to the return of the writ, or at least before forfeiture of the bail-bond had ensued; and in *Turner v. Wheatley*, (d) the court were of opinion that bail above only, could surrender the principal after the return of the writ, and that bail to the sheriff could not discharge themselves from their responsibility, but by putting in and

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of the bail to render him, nor of the party to surrender himself into the custody of the sheriff before the return of the writ, without the consent of the latter. Bail above are indeed said to be the legal gaolers of the defendant, and may take and render him at any time, but this is not the case with respect to bail to the sheriff; their undertaking is, that the party shall appear at the return of the writ, which according to the case of *Harrison v. Davies*, 5 Burr. 2683, can only be satisfied by their putting in bail above. That case I consider as having decided the point, which has never since been controverted. For the case of *Jones v. Lander*, and the others which followed it, only went the length of giving an option to the sheriff, if he pleased to accept the surrender of the party, who was willing to return into his custody before the return of the writ; but the sheriff may refuse so to do, and may rest upon the security of the bail-bond, and insist upon the bail performing the condition of it. Per Lord Kenyon.

(c) *Plimpton v. Howell*, 10 East, 100. In this case, Le Blanc, J. said, "We do not mean to say that the assent of the sheriff to the surrender, may be given at any indefinite time or to any person, but this was a surrender to the gaoler of the county gaol before the return of the writ, and the assent of the under-sheriff was given the next day by letter, which was as soon after as the distance would reasonably admit of, to confirm the antecedent surrender."

(d) 1 Price, 262. See vide *Harding v. Hepnem*, 3 B. & P. 232.

Action on  
the bail-  
bond.

Setting  
aside pro-  
ceedings.  
Render of  
principal.

Death of  
principal.

justifying bail to the action ; for though the assignment might be subsequent to the surrender, yet as the bond was forfeited before, the render could not exonerate them.

Rendering the defendant to the King's Bench Prison, before the return of the writ, will not discharge the bail.(e)

If the plaintiff or defendant die after the arrest, and before the return of the writ, the court will set aside the proceedings on the bail-bond. (f)

### *Of the Pleadings in an Action on the Bail-bond.*

Declaration.  
Title of the  
term.

As it is an established rule of pleading, that a declaration entitled generally, (g) relates to the first day of the term, if the bail-bond be assigned after that day, the declaration should be entitled specially, or it will be demurrable, (h) or the parties may move in arrest of judgment, or bring a writ of error. (i) But where the declaration is improperly entitled, the plaintiff on payment of costs, may obtain a rule to amend, even after error brought. (k)

Venue.

According to the maxims *debitum et contractus sunt nullius loci*, the venue is transitory and may therefore be laid in any county. (l)

Describing  
plaintiff as  
assignee.

Where the action is brought by an assignee, he should be described as suing in that character ; the two officers

(e) Forster v. Hyde, M. 41 Geo. 3. K. B. cited 1 Tidd, 248. 7th ed.

(f) Hutchinson v. Smith, 8 Mod. 240.

(g) Pugh v. Robinson, 1 T. R. 116. Barker v. Thorold, 1 Saund. 40. n. 2 Bl. 735., Carth. 113. See Best v. Wilding, 7 T. R. 4. Swancott v. Westgarth, 4 East, 75.

(h) Pugh v. Robinson, 1 T. R. 116. See Dickinson v. Plaisted, 7 T. R. 474.

(i) Dickinson v. Plaisted, 7 T. R. 474.

(k) Ibid. See 1 Wils. 171. Coutanche v. Le Ruez, 1 East, 132. Randole v. Bailey, 1 M. & S. 232.

(l) Gregson v. Heather, 2 L. Raym. 1455., 2 Str. 727., Forts. 366. s. c.



in Middlesex constituting only one sheriff, the declaration would be demurrable, if the plaintiff were described as the assignee of the sheriffs, instead of the sheriff of that county. (m)

Action on the bail-bond.

Declaration. Describing plaintiff as assignee.

Although the action on the assignment is brought by an executor, it may be in the debet and detinet. (mm)

Describing the former action.

It should be stated in the declaration with certainty and precision in what court, (n) and at whose suit, and for what sum or cause of action the defendant became bail; for where it was averred in the declaration, that by a writ of *latitat* the sheriff was commanded to take one "F. J. by the name of J. J.," an examined copy of a *latitat* was given in evidence, commanding the sheriff to take "J. J." The bail-bond was signed by the principal, "F. J. arrested by the name of J. J.," and the plaintiffs offered to prove that this person was their debtor, whom they intended to hold to bail. Lord Ellenborough said, "The writ must speak for itself; I cannot hear that instead of A. B. mentioned in a writ, it was meant that the sheriff should arrest X. Y.;" and the plaintiff was nonsuited. (o)

So where the declaration stated that the sheriff was commanded to take the said defendant, *Thomas Attwood*, to answer the plaintiff of a plea of trespass, "and also to a bill of the said plaintiff against the said defendant," it was holden to be clearly defective, but the court gave leave to amend upon payment of costs. (p)

After it has been stated in what court, and at whose suit, and for what sum or cause of action the writ was issued; the declaration proceeds to state the endorse-

Endorsement of the writ.

(m) *Sheriff of Middlesex v. Barnes*, 2 Ld. Raym. 1135., 4 Bac. Ab. Sheriff, K. 447. (mm) *Brumfield v. Lander*, cited 1 Selw. N. P. 570.

(n) *Impey v. Taylor*, 3 M. & S. 166.

(o) *Scandover v. Warne*, 2 Campb. 270. See *Wilks v. Lorch*, 2 Taunt. 399. *Shadgett v. Clipson*, 8 East, 328.

(p) *Large v. Attwood*, 1 D. & R. 551.

Action on  
the bail-  
bond.

Declaration.  
Endorse-  
ment of the  
writ.

ment for bail on the back of the process; corresponding with the sum specified in the affidavit of debt. (q) It is improper to introduce an allegation which is inserted in most of the printed precedents, (r) "that the arrest was made under or by virtue of an affidavit of the cause of action duly filed of record." (s)

In *Whiskard v. Wilder*, (t) it was contended that without shewing the affidavit, and that the sum sworn to was endorsed on the writ, there was no sufficient authority to arrest the defendant, and that the bail-bond must be void; but Lord Mansfield said, that upon reading the 12 Geo. 1. c. 29. s. 2. which enacts the endorsement on the back of the writ of the amount sworn to, it did not appear essentially requisite to the validity of the bail-bond, nor in the nature of a condition precedent to it; but on the contrary, the 12 G. 1. appears to be only directory to the sheriff, so that though the sheriff may be himself answerable for such an omission, yet the bond is not void. But if an averment or substantive allegation of the existence of an affidavit be made, although improperly, it must be produced at the trial and proved. (u)

Delivery to  
the sheriff,  
and arrest.

The writ is then stated to have been delivered to the sheriff, by virtue of which the arrest was made. It is however, not requisite to allege that the defendant in the original action was arrested, and if stated is not traversable. (x)

(q) In *Wilson v. the Sheriff of Middlesex*, 2 Chit. pl. 205. n. s., the declaration stated the writ to have been endorsed for 24l. but the writ produced at the trial was indorsed 24l. and upwards, besides &c., this was held to be no variance.

(r) See Petersdorff's Index to Precedents in Pleading.

(s) *Webb v. Herne*, 1 B. & P. 281. *Arundel v. White*, 14 East, 224.

(t) *Whiskard v. Wilder*, 1 Burr. 330. See the remarks of Sir Jas. Mansfield, C. J. on this case, in *Hill v. Heale*, 2 N. R. 201.

(u) *Webb v. Herne*, 1 B. & P. 281.

(x) *Watkins v. Parry*, 1 Stra. 444. *Haley v. Fitzgerald*, *ibid.* 643., 2 Saund. 59. a., Forts. 364.

The bail-bond, condition, and breach by the non-appearance of the defendant in the original action, and assignment by the sheriff to the plaintiff is next stated. (y)

Action on  
the bail-  
bond.

Declaration.  
Assignment  
of the bond.

In setting forth the assignment, it may be alleged to have been made in a different county from that in which the bail-bond was actually given, (z) and it is sufficient to state that the sheriff assigned the bond to the plaintiff, according to the statute, without alleging that the assignment was sealed or witnessed; (a) and if it be averred that the sheriff assigned the bail-bond by endorsement upon the said writing obligatory, and attested it under his hand and seal, in the presence of two credible witnesses, (b) or if it be averred that the assignment was made in the presence of two credible witnesses, it is sufficient, without averring that the endorsement was attested by two credible witnesses; (c) but if it appear on the face of the declaration, to have been attested only by one witness, it will be demurrable. (d).

The declaration must shew that the money is due from the bail and not from the principal, for when it concluded thus, "whereby an action hath accrued to the plaintiff to demand and have of the principal instead of the bail, and averred that the principal had not paid," it was holden

(y) The bond must appear to have been taken by the sheriff, before the return of the writ, otherwise the declaration will be demurrable. *Pullein v. Benson*, 1 Ld. Raym. 352. 2 Saund. 60. a. n. *Samuel v. Evans*, 2 T. R. 569. and as the bond was void *ab initio*, it may be avoided under the plea of *non est factum*. *Thompson v. Rock*, 4 M. & S. 338.

(z) *Gregson v. Heather*, 2 Stra. 727. s. c. 2 Ld. Raym. 1455. *Robinson v. Taylor*, Forts. 366., 2 Saund. 61.

(a) *Dawson v. Papworth*, Willes, 408, 409. n. a. *Leafe v. Box*, 1 Wils. 121. *Robinson v. Tayler*, Forts. 366: 2 Saund. 61. b.

(b) *Leafe v. Box*, 1 Wils. 121.

(c) Id. 122. Per Wright, J.

(d) *Dawson v. Papworth*, Willes, 409. n. a.

Action on  
the bail-  
bond.

Pleas.  
Non est  
factum.

bad on special demurrer. (e) As the assignment is not by deed, a *profert in curiam* is unnecessary. (f)

The bail-bond being the foundation of the suit, and not merely matter of inducement, *non est factum* and not *nil debet* is the proper plea; (g) but if the latter be pleaded by mistake, instead of *non est factum*, and the plaintiff join issue upon it, instead of demurring, and go to trial; the defendant will be at liberty to avail himself of any defence he may think proper. (h)

Under the plea of *non est factum*, the defendant may prove that the bail-bond was executed before the condition was filled up, (i) or that it was taken after the return of the writ, it being a mere nullity, the defendant need not plead the matter of avoidance specially, but may give it in evidence, under the general issue; (k) or if the bond or condition be in other respects incompatible with the stat. 23 Hen. 6. c.9. and the defect appear in the declaration, it need not be pleaded, and the court on motion will arrest the judgment after verdict against the defendant, upon a plea of *non est factum*. (l)

Although it is irregular to bring an action on a bail-bond, in a different court from that in which the original

(e) *Morgan v. Sargeant*, 1 B. & P. 58.

(f) *Leafe v. Box*, 1 Wils. 121.

(g) *Warren v. Consett*, 2 Ld. Raym. 1500. s. c. 8 Mod. 107. s. c. 2 Str. 778. *Tyndal v. Hutchinson*, 3 Lev. 170. *Hart v. Weston*, 5 Burr. 2586. *Jones v. Pope*, 1 Saund. 38. n. *Roberts v. Marriett*, 2 Saund. 187. a. See *Morse v. James*, Willes, 127. *Nil debet* to debt on bond is bad on general demurrer, though perhaps it might be aided after verdict, 2 Wils. 10.

(h) *Rawlins v. Danvers*, 5 Esp. 38. *Hutcheson v. Kearns*, 1 Selw. N. P. 575. 5th ed.

(i) *Powell v. Duff*, 3 Campb. 181. See *Shelden v. Hentley*, 2 Show. 160., Com. Dig. Fait. (A.) 1. *Weeks v. Maillardet*, 14 East, 568.; Perk. s. 118. *Texera v. Evans*, cited 1 Anst. 228.

(k) *Thompson v. Rock*, 4 M. & S. 338.

(l) *Samuel v. Evans*, 2 T. R. 569.

action was commenced, yet the objection cannot be taken under a plea of *non est factum*, but the irregularity may be specially pleaded, or probably made the subject of a summary application to the court to stay the proceedings. (*m*)

Action on  
the bail-  
bond.

Pleas.  
Non est fac-  
tum.

The bail may plead (*n*) that the bond was taken for ease and favour, subsequent to the return-day of the process, contrary to the 23 Hen. 6. c. 9. (*o*) The statute need not be set forth, as it is a public act; (*p*) but if it be unnecessarily stated and misrecited, the mistake will be fatal; (*q*) or if the bond be void on the face of it, the plea of *non est factum* will suffice.

Ease and  
favour.

The bail may also plead no process issued against the principal, (*r*) or that there is no affidavit of the cause of action filed, of record; (*rr*) or that the debt was levied on the principal since the commencement of the action. (*s*)

No process  
against the  
principal,  
or affidavit  
of cause of  
action filed.

After having obtained oyer of the condition the bail may plead an appearance on the day conformable to the form and effect of the condition; and that such appearance they are ready to verify by the record. (*ss*) This plea is termed a plea of *comperuit ad diem*; (*t*) but if on an inspection of the record, the appearance is not

Comperuit  
ad diem.

(*m*) Wright v. Walmsby, 2 Camp. 396.

(*n*) Precedents, 5 Went. 479. 482. 2 Chit. pl. 510. For other forms see Petersdorff's Index to Precedents in Pleading—Title, Bail-bond.

(*o*) Com. Dig. Pleader, 2 W. 25. See ante, page 8.

(*p*) Samuel v. Evans, 2 T. R. 569.

(*q*) King v. Marsack, 6 T. R. 776. Boyce v. Whitaker, Doug. 94. In the latter case, Ld. Mansfield said, "That if the defendant had unnecessarily set out the act of parliament, which it seemed to him he had, he would hold him to half a letter."

(*r*) Precedent, 2 Chit. pl. 509.

(*rr*) Ibid. pl. 488.

(*s*) 3 Chit. pl. 493.

(*ss*) Bret v. Sheppard, 1 Leon. 90.

(*t*) Precedents, 5 Went. 470. 478. 482. 2 Chit. pl. 511. For other forms, see Petersdorff's Index to Precedents in Pleading—Title, Bail-bond.

Action on  
the bail-  
bond.

Pleas.  
Comperuit  
ad diem.

That the  
assignment  
to the plain-  
tiff was not  
stamped.

That the  
principal  
was taken  
under an  
attachment  
for non-  
payment of  
costs.

That the  
action was  
brought for  
the benefit  
of sheriff's  
officer.

entered, the bond will be forfeited. (u) When the issue depends on the date of the appearance, the Court of Common Pleas, upon application by the plaintiff, will order the exact day of the appearance to be entered in the filazer's book, although before the application to the court, issue has been joined on the plea of *comperuit ad diem*. (x)

The statute 4 & 5 Anne, c. 16. requires that the assignment should be stamped prior to any action being brought thereon; (y) it is therefore a good defence to plead, that the plaintiff has declared without first having the assignment of the bond duly stamped, according to the directions of the act. (z)

It was formerly considered that bail could not be taken under attachments issuing out of the courts of common law for nonpayment of costs, and that a plea disclosing such circumstances would be sustainable; (a) but it appears now to be settled, that such bonds are valid and effectual. (b)

As matters of defence in equity, (c) or merely founded on the indulgence of the court, are not pleadable; (d) the bail cannot plead (e) that the action was brought by the sheriff for the benefit of, and as trustee for, the sheriff's officer who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return-day, but before the sheriff was ruled to return the writ,

(u) Corbet v. Cook, Cro. Eliz. 466.

(x) Austen v. Fenton, 1 Taunt. 23. 2 Hammond, 901. p. 6.

(y) See ante, p. 215.

(z) Precedent, 5 Went. 470. See White v. Howard, 3 Taunt. 339.

(a) Phelps v. Barrett, 4 Price, 23. See Studd v. Acton, 1 H. Bl. 468.

(b) Lewis v. Morland, 2 B. & A. 56. Ante, p. 199.

(c) 7 East, 153. Tidd, 344. 10 East, 377.

(d) 2 East, 442. 4 id. 311. 7 id. 153. 2 Campb. 396.

(e) Scholey v. Mearns, 7 East, 147.

and who accepted the money so paid by the defendant in full satisfaction and discharge of the bail-bond and fees, &c. In *Offly v. Warde*, (f) it was decided that the officer could not release the bond though given for his use; and as he could not release the obligation, he could not accept any thing in satisfaction of it. Lord Ellenborough said in *Scholey v. Mearns*, (g) "If we were to take notice of such a defence as this, there would be an end at once of the simplicity of the common law, and of all the distinctions between law and equity. So that in no view of the case can the plea be sustained."

Action on the bail-bond.

Pleas.

That the action was brought for the benefit of sheriff's officer.

A plea not going to the merits, but founded on the practice of the court, is bad, as it neither denies nor avoids the contract as stated in the declaration; and the defendant ought to take advantage of mere matters of irregularity, by pleading them in abatement, or by a special application to the court: (h) hence to an action by the assignee of a bail-bond, a plea that the cause was out of court for want of a declaration before the assignment of the bond was obtained, cannot be supported. (i)

Matters of practice.

Although it is sufficient to state in the declaration, that the bail-bond was duly assigned by the sheriff to the plaintiff, according to the form of the statute, without adding that the assignment was under the hand and seal of the sheriff, yet the defendant may plead in general terms, that the sheriff did not assign, &c. according to the form of the statute, and issue may be taken on these

That the bond was not assigned according to statute.

(f) 1 Lev. 235. See *Scudamore v. Vandennstene*, 2 Inst. 673.

(g) 7 East, 152.

(h) *Walmesley v. Macey*, 5 B. Moore, 168. See *Ball v. Swan*, 1 B. & A. 393.

(i) *Carmichael v. Troutbeck*, cited 2 East, 442. See *Sampson v. Brown*, 2 id. 438.

Action on  
the bail-  
bond.

Replications.

Ease and  
favour.

words, notwithstanding they involve a question of law; and it will be incumbent on the plaintiff to prove, that the assignment was according to the statute, under the hand and seal of the sheriff. (k)

If the defendant has pleaded ease and favour, and the action is at the suit of the assignee of the sheriff, the plaintiff should reply, stating that it was duly executed, and deny the ease and favour; concluding to the country many of the precedents, contain a formal traverse of that fact, and conclude with a verification, but this seems untechnical and unnecessary. (l) If the action be in the name of the sheriff and the bond is not set forth in the plea, the plaintiff should pray that the bond may be enrolled, and then set it out and state that he was sheriff, &c., and the arrest of the defendant, and that the bond was made to the plaintiff as sheriff, and traverse the ease and favour. (m)

No process  
against the  
principal.

The replication to a plea of no process against the principal, should set out the writ and conclude with a verification. (n)

Comperuit  
ad diem.

To the plea of *comperuit ad diem* the plaintiff may reply *nul tiel* record, that is denying the existence of any such record of appearance as stated in the plea. (o) When the record is of the same court, the replication ought to conclude with giving a day to the defendant, (oo) but when the record is of another court, the replication

(k) Dawes v. Papworth, Willes, 408.

(l) 1 Saund. 163. n. 2 Com. Dig. Pleader, 2 W. 25. See precedent, 2 Chit. pl. 646. For other forms, see Petersdorff's Index to Precedents in Pleading.

(m) Abney v. White, Carth. 301, 302. Blewett v. Appleby, 1 Lutw. 680. 685. See also 1 Saund. 9. 2 id. 60.

(n) 2 T. R. 576. 2 Marsh. 534. contra.

(o) See 1 Saund. 92. 2 id. 60. Lill. Ent. 498.

(oo) Cremer v. Wicket, 1 Ld. Raym. 559., Carth. 517. s.c.



should conclude with a verification and a prayer of judgment.(p)

Action on  
the bail-  
bond.

The replication of *nul tiel record* and giving a day, makes a complete issue; and if the adverse party demurs, the other need not join in demurrer, but on failure at the day judgment may be signed. (q)

Replication.  
Comperuit  
ad diem.

### *Evidence, and subsequent Proceedings.*

As the plea of *non est factum* does not put in issue any other averment in the declaration than the execution of the bond, it will only be necessary for the plaintiff to prove that it was executed by the defendant; (r) but evidence that a person of the same name as the defendant signed and delivered the bond is not sufficient, some proof will be required that the person who executed it, not merely bears the name but is the defendant himself. (s) This additional proof may be supplied by establishing the signature to be the defendant's handwriting, and the defendant's attorney is competent to prove this fact. (t) The validity of the bond being dependant on the delivery as well as the signing and sealing of it, the former must invariably be proved. (u)

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(p) *Sandford v. Rogers*, 2 Wils. 113. *Newberry v. Stradwick*, Com. Rep. 533. See 1 Saund. 92. n. 3. 2 T. R. 443.

(q) *Tipping v. Johnson*, 2 B. & P. 302. In *Jackson v. Wickes*, 7 Taunt. 30. 2 Marsh, 354. s. c. It was held, that where a defendant, in his replication avers a record of the same court, he may at once pray that the court will inspect the record, without giving the defendant an opportunity to rejoin by traversing the record, and making a perfect issue between the parties.

(r) *Hutchison v. Kearns*, C. B. London sittings, T. T. 50 Geo. 3. Sir J. Mansfield, C. J. cited 1 Selw. N. P. 575.

(s) *Memot v. Bates*, H. 4 G. 2. Bul. N. P. 171.

(t) *Duffin v. Smith, Peake*, N. P. C. 108. *Robson v. Kemp*, 5 Esp. 52. Bul N. P. 284. See *Dutchess of Kingston's case*, 11 St. Tr. 253.

(u) *Chamberlain v. Stanton*, Cro. Eliz. 122. 1 Leon, 140. *Dyer* 192, in margin.

Action on  
the bail-  
bond.

Evidence:  
Non est  
factum.

The execution of every attested instrument ought to be proved by a subscribing witness, if he can be produced and is capable of being examined. (x) Such witness alone is competent to prove the execution, because he may be able to state the time when it was executed, and explain circumstances attending the transaction which are unknown to a stranger; and for this reason it has been holden that a confession or acknowledgment of the party executing will not dispense with this testimony. (xx)

This rule of evidence extends to all cases, whether the bond be an existing instrument, or cancelled, or lost, and parol evidence be given of its contents, the subscribing witness, if known, must be called; (y) but where the subscribing witness is dead or blind, (z) or incompetent to give evidence, either from insanity, (a) or from interest acquired after the execution of the deed, (b) or from infamy of character, (c) or where the subscribing witness is absent in a foreign country, (d) or out of the jurisdiction of the court, so as not to be amenable to process, (e) or where he cannot be found after strict and diligent inquiry, (f) or where he is purposely kept out of the way

(x) *Abbot v. Plumbe*, 1 Doug. 216. See 7 T. R. 267. 2 East, 187. 4 M. & S. 350. 1 Leach, C. C. 208. 4 Esp. 240.

(xx) *Abbott v. Plumbe*, Doug. 216. *Call v. Dunning*, 4 East, 53.

(y) *Peake*, N. P. C. 30.

(z) *Wood v. Drury*, 1 Ld. Raym. 724. Holt, C. J.

(a) Vin. Abr. tit. Evidence (T. B. 48.) pl. 12. *Burnett v. Taylor*, 9 Ves. Jun. 381. *Currie v. Child*, 3 Campb. 283.

(b) *Goss v. Tracey*, 1 P. Wms. 287. 289. *Godfrey v. Norris*, 1 Stra. 34. *Swire v. Bell*, 5 T. R. 371.

(c) *Jones v. Mason*, 2 Stra. 883.

(d) *Coghlan v. Williamson*, 1 Doug. 93. *Wallis v. Delancey*, 7 T. R. 266. *Adam v. Kerr*, 1 B. & P. 361.

(e) *Prince v. Blackburn*, 2 East, 250. 1 B. & P. 361. *Ward v. Wells*, 1 Taunt. 161. *Hodnell v. Forman*, 1 Starkie, 90.

(f) Anon. case, 12 Mod. 607. by Holt, C. J. 7 T. R. 266. *Cunliffe v. Sefton*, 2 East, 183. *Crosby v. Percy*, 1 Taunt. 365. *Parker v. Hoskins*, 2 Taunt. 223. *Wardel v. Fermor*, 2 Campb. 282. *Doe dem. Johnson v. Johnson*, 2 Chit. Rep. 196.

by the opposite party, (g) the handwriting of the attesting witness is evidence of every thing on the face of the instrument; the sealing and delivering will be presumed; and it will not be necessary to prove the handwriting of the defendant. (h)

Action on  
the bail-  
bond.

Evidence.  
Non est  
factum.

It is not absolutely necessary, that the witness should see the party sign or seal; if he sees him deliver it already signed and sealed, or merely sealed as his own deed, it will be sufficient. (hh)

The defendant cannot object to an attesting witness as incompetent to prove the execution on account of his interest, after having requested him to attest the execution, with full knowledge of the situation in which he stood; (i) hence in an action by the sheriff, the bound bailiff, who made the caption, is a competent witness to prove the execution of the bond, if he witnessed it at the desire of the defendant. (k)

The defendant on the general plea of *non est factum*, may give in evidence any thing which proves the deed to be void at the time of pleading, as erasure, interlineation, or material alteration by the obligor, or even by a stranger, without the privity of the former, (l) or coverture, (m) or lunacy, (mm) or intoxication, (n) or that it was exe-

(g) *Burr v. Walker*, 4 B. & A. 697.

(h) *Prince v. Blackburn*, 2 East, 250. *Adam v. Kerr*, 1 B. & P. 360. *Milward v. Temple*, 1 Campb. 375. *Wallis v. Delancey*, 7 T. R. 266.

(hh) *Parke v. Mears*, 2 B. & P. 53. See 1 Phill. Ev. 413.

(i) *Honeywood v. Peacock*, 3 Campb. 196. See *Sirre v. Bell*, 5 T. R. 371. (k) *Honeywood v. Peacock*, 3 Campb. 196.

(l) *Whelpdale's case*, 5 Co. 119. Co. Litt. 356. n.

(m) *Anon*, 12 Mod. 609. *Lambert v. Atkins*, 2 Campb. 272. Com. Dig. Pleading, 2 W. 18. See *Dr. Prince*, 2 Campb. 113. *Doe dem. George and Frances Japan*, 6 East, 80. 2 Smith, 236.

(mm) *Yates v. Boen*, 2 Stra. 1104. *Faulder v. Silk*, 3 Campb. 126. *Thompson v. Leach*, 2 Salk. 675. 2 Atk. 412. *Beverley's case*, 4 Co. 123.

(n) *Cole v. Robbins*, cited Bull, N. P. 172. See *Pitt v. Smith*, 3 Campb. 33. *Fenton v. Holloway*, 1 Stark. 126. *Hopewell v. De Pinna*, 1 Fonb. Eq. 67. 1 Ves. 19. or that it was delivered as an escrow, *Stoytes v. Pearson*, 4 Esp. 225. See *Bushell v. Pastmore*, 6 Mod. 217. s. c. *Holt*, 213. *Johnson v. Baker*, 4 B. & A. 440.

Action on  
the bail-  
bond.

Evidence.  
Ease and  
favour.

cuted before the condition was filled up, (o) or dated and made after the return-day of the process. (p)

If the bond be dated and made after the return of the writ, it has been seen that the defendant may avoid it on *non est factum*; (q) but if it be dated antecedent to the return of the process, though executed subsequent to the return, the defendant must plead specially the fact, and if issue be taken on the plaintiff's replication, that it was duly executed, it will be incumbent on the defendant to prove the exact day the writ was returnable, and to shew that the bond was executed previous to that time. To prove the issuing and return-day of the writ, an office copy should be adduced in evidence, as it has been declared not sufficient to produce the præcipe in the filazer's book, and to prove a notice to produce the writ, unless it be shewn that search has been made at the treasury, and that subsequently to the return day, the writ has been seen in the possession of the opposite party. (r)

No process  
against the  
principal.

The affirmative of the issue of no process against the principal, is sustained by the production of a transcript of the writ taken from the record, and proved by a witness who has compared the copy line for line with the original, or who has examined the copy while another person read the original. (s)

Of the sum  
recoverable.

The amount which the plaintiff is entitled to recover, is not, as has been suggested in argument, (t) limited to the sum sworn to and costs; but the bail are liable to pay the plaintiff the whole debt, for which the plaintiff

(o) *Powell v. Duff*, 3 Campb. 182.

(p) *Thompson v. Rock*, 4 M. & S. 338.

(q) *Vide ante*, p. 208. *Thompson v. Rock*, 4 M. & S. 338.

(r) *Edmonstone v. Plaisted*, 4 Esp. 160. *Gilb. Ev.* 40. *Bull, N. P.* 234. *Peake, Ev.* 50. *Phil. Ev.* 312.

(s) *M'Niel v. Perchard*, 1 Esp. 263. *Rolf v. Dart*, 2 Taunt. 52. *Reid v. Mayson*, 1 Campb. 470. *Gyles v. Hill*, *id.* 471. n.

(t) *Stevenson v. Cameron*, 8 T. R. 29.

might have had judgment against the original defendant to the full extent of the penalty in the bond; (u) and it seems that where bail are let in upon terms to try the cause, the money levied to abide the event, and the bail-bond to stand as a security; the bail are not liable beyond the penalty, though the debt and costs exceed it after the trial, and the plaintiff's debt would have been fully covered when the bail were first let in to try upon terms. (x)

Action on  
the bail-  
bond.

Of the sum  
recoverable.

Each of the bail are liable for his own costs as well as to costs in the first action. (y)

Costs.

Where several actions are brought upon the bail-bond, which we have seen is discountenanced by the courts as unnecessary and oppressive, it is usual in issuing out execution to apportion the debt and costs in the original action, amongst the different defendants, so as to levy a part on each, together with his own cost. But where the principal is also sued, the costs of the first action are commonly levied upon him only.

Execution.

(u) *Orton v. Vincent*, Cowp. 71. *Mitchell v. Gibbons*, 1 H. Bl. 76. *Miffin v. Morgan*, 2 Ld. Raym. 1564. *Stevenson v. Cameron*, 8 T. R. 29. *Jackson v. Hassell*, 1 Doug. 330. *Clarke v. Bradshaw*, 1 East, 91. n.

(x) *Goss v. Harrison*, 2 Smith, 364:

(y) 2 Saund. 61. n. *Stevenson v. Cameron*, 8 T. R. 29. *Orton v. Vincent*, Cowp. 71. *Mitchell v. Gibbons*, 1 H. Bl. 76.

## CHAPTER VII.

## OF SPECIAL BAIL TO THE ACTION.

## SECTION I.

## GENERAL NATURE OF BAIL TO THE ACTION.

IN the third section of the preceding chapter, it was stated, that if the defendant did not appear according to the condition of the bond, by putting in and perfecting bail above in due time, a forfeiture of the bail-bond would be incurred, and that the plaintiff might call on the sheriff to assign that instrument to him. It will therefore be material, in the present stage of our inquiries, to ascertain what will be a sufficient compliance with the condition of the bond, so as to exonerate the bail to the sheriff, and obviate the consequences detailed in the former chapter.

As the bond is conditioned for the defendant's appearance in court on the return day of the process, it is obvious that in strictness of law nothing can be a performance of that condition, but effecting what is technically termed an appearance. (a) This is accomplished by putting in special bail to the action or bail above, as they are in general denominated in contradistinction to bail below, or bail to the sheriff. Bail above or special bail may be defined to be persons who undertake generally, or in a

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(a) *Harrison v. Davies*, 5 Burr. 2684. unless the defendant has surrendered before the return of the writ to the sheriff, 6 T. R. 753. 7 id. 122. 1 Taunt. 425. 8 T. R. 465. 505. *Callaway v. Seymour*, E. T. 42. Geo. 3. K. B. cited *Tidd's Prac.* 248. See ante, 249. In *Fowell v. Leo*, 1 Taunt. 425. the Court of Common Pleas deviated from this rule, and permitted the defendant to pay into court a sufficient sum to cover the debt and costs, instead of giving bail.

sum certain, that the defendant, if convicted, shall satisfy the plaintiff or render himself to proper custody, according to the established practice of the court in which the recognizance (the security required) shall be taken and recorded.

General nature of bail to the action.

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## SECTION II.

### WAIVER OF THE RIGHT TO BAIL.

ALTHOUGH the plaintiff in general is entitled to the security of bail, there are certain acts of irregularity which, according to the practice of the courts, will constitute a waiver of the right, such as delivering a declaration in chief before bail has put in, demanding or accepting a plea after delivering a declaration *de bene esse*, or by taking any other subsequent step in the cause, before the defendant has fulfilled his prior duty of putting in bail to the action. (b)

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## SECTION III.

### NUMBER OF PERSONS REQUIRED.


THE bail must be two or more responsible persons. One is not considered sufficient even for the purpose of rendering the defendant; (c) and in general, there are two

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(b) *Lister v. Wainhouse*, Barnes, 92. 1 Sel. Prac. 156. See the *King v. the Sheriff of London*, 1 D. & R. 163.

(c) *Steward v. Bishop*, Barnes, 60.

Number of  
persons re-  
quired.



only; though in the Court of King's Bench,<sup>(d)</sup> or Exchequer,<sup>(e)</sup> where, from the magnitude of the demand, it may be evident that no inconvenience could accrue to the plaintiff from having to seek small and inconsiderable sums from many parties, those courts have permitted three or four persons to become bail, in different sums, amounting in the aggregate to double the amount sworn to. But the practice is said to be different in the Common Pleas. <sup>(f)</sup>

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#### SECTION IV.

##### WHO MAY OR MAY NOT BE BAIL TO THE ACTION.

General  
justification.

It is a general principle to which an undeviating adherence is observed, that to qualify a person to be bail, he must either be a freeholder or housekeeper, liable to the ordinary process of courts of justice, and *bonâ fide* worth double the amount of the sum sworn to, or one thousand pounds beyond that sum, if it exceed one thousand pounds after the payment and discharge of his debts. If there be more than two bail, they must respectively be possessed after the liquidation of their debts, double the aliquot portion of the amount for which they have become responsible. Although the preceding requisites are the usual qualifications required to render persons competent to be bail, and every person who does not possess them is incapable of being admitted as such; yet the

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(d) Anon. Lofft, 26. 252. Nuller v. Jenkins, cited 1 Fort. 138. Sel. Prac. 169. Jell v. Douglas, 1 Chit. Rep. 601.

(e) De Tastel v. Kroger, Wightw. 110. Forrest, 138.

(f) Alleyn v. Keyt, 2 Bl. Rep. 1122.



converse of the proposition is not tenable, that all who do possess them are necessarily qualified. Various causes have induced the courts to exclude different classes of the community from being received as bail, and as the grounds of disqualification are numerous and connected with minute distinctions, it is proposed in the present section to consider them under the twofold divisions of personal and temporary incapacity. And while attempting to define them, to notice the exceptions which have on different occasions been introduced.

Who may  
or may not  
be bail to  
the action.

The King and the Royal Family, (g) the servants of the King, (h) peers of the realm, (i) ambassadors and their servants, (k) members of the House of Commons, (l) officers of the different courts of justice, (m) or persons living within the verge of the palace, (n) being respectively exempt from the ordinary process of the law, are incompetent to justify as bail.

1st. Personal incapacity.

It is a rule in all the courts that no attorney or any other person practising as such, shall be bail in any suit or action depending therein. (o) This salutary regulation was introduced for the benefit and protection of attorneys against the importunities of their clients, and has been adhered to with inflexible rigour. It has been described as being not only beneficial to the attorney, but advantageous to the suitor. (p) In one case it was suggested,

Attorney.

(g) Vide ante, p. 41.

(h) Anon, 1 D. & R. 127.

(i) Burton v. Atherton, 2 Marsh, 232, et vide 1 V. & B. 208.

(k) Vide ante.

(l) Graham v. Sturt, 4 Taunt. 228. Duncan v. Hill, 1 D. & R. 126.

(m) See ante, p. 66. In Dutton v. Wolstead, 2 Chit. Rep. 77. one of the 60 sworn clerks of the Six Clerks Office, was allowed to justify as bail, but his exemption from ordinary process was not adverted to. See ante, p. 66. n. (g) 1 Sid. 68.

(n) 2 Bl. Rep. 956. See 1 Sel Prac. 171.

(o) B. R. M. 1654. R. M. 6 G. 2. R. M. 14 G. 2. Doug. 466. n. Cowp. 828.

(p) 1 Chit. Rep. 715, n.

Who may  
or may not  
be bail to  
the action.

1st. Personal incapacity.  
Attorney.

that the rule did not apply to an attorney not concerned in the same cause, but the ground of objection appears to be more general, and this distinction has been repudiated. (q) The rule, however, is confined to practising attorneys, for where one of the proposed bail had formerly been an attorney, but had not practised or renewed his certificate for six years anterior to the time of his becoming bail, he was considered competent. (r)

According to the practice of the Court of King's Bench, a certificated attorney may be put in as bail, (s) and the plaintiff cannot consider the bail as a nullity, and take an assignment of the bail-bond, but must enter an exception and oppose him on the ground of his incapacity, when he attends to justify; (t) though in the Common Pleas a different rule of practice appears to obtain, as the plaintiff in that court, it is said, may treat such bail as a nullity, (u) but the propriety of this doctrine has been much doubted; (x) and in a recent case it was decided that where an attorney has been allowed to justify without opposition, that court will not set aside the rule for the allowance of the bail. (y) And in the Common Pleas, as well as in the King's Bench, an attorney may become

(q) Anon, 1 Chit. Rep. 714.

(r) Anon, 1 Chit. Rep. 714. n. See the King v. the Sheriff of Surry, 2 East, 182. Bell v. Gate, 1 Taunt. 162. See ante, p. 69.

(s) Anon, 1 Chit. Rep. 714. In Thomson v. Roubell, 2 Doug. 467. n. the court said that the bail-piece was not void; the attorney, although he ought not to have been bail, and was punishable by the court, was, notwithstanding, liable to the plaintiff, who, by not objecting, had accepted his security.

(t) The King v. the Sheriff of Surry, 2 East, 181. Foxall v. Bowerman, id. 182.

(u) Fenton v. Ruggles, 1 B. & P. 356. Wallace v. Arrowsmith, 2 id. 49. Allingham v. Flower, id. 246. Redit v. Broomhead, id. 564. Jackson v. Hillas, E. T. 45 G. 3. cited 1 Taunt. 162. Richie v. Gilbert, 1 Taunt. 164. n.

(x) 1 Taunt. 163, 164.

(y) Bell v. Gate, 1 Taunt. 162.

bail *pro forma*, in order to surrender the defendant without justifying (z)

Who may or may not be bail to the action.

Notwithstanding an attorney is prohibited from being bail, and an infringement of the regulation might subject him to penalties, he will be liable to an action upon the recognizance. (a)

1st. Personal incapacity.

The rule interdicting an attorney from being admitted as bail, extends to his clerks, whether they be articulated or not; (b) and the rule is equally applicable, though the party is not in the service of the defendant's attorney; (c) but there appears to be no objection to a clerk becoming bail for his employer. (d)

Attorney's clerk.

As great inconvenience, not unmixed with oppression, (e) had frequently arisen from the practice of allowing officers concerned in the execution of process to become bail, the courts by a general rule ordered, "that no sheriff's officer, bailiff, or other person, concerned in the execution of process, should be permitted or suffered to become bail in any action or suit depending therein." (f)

Sheriff's officer, &c.

This rule is confined to persons actually and necessarily concerned in the execution of process; hence, it is not a sufficient ground for rejecting a person as bail, that he is described "of A. in the county of B. gaol-keeper,"

(z) *Per curiam*, M. T. 42 G. 3. K. B. cited Tidd, 270. 7th edit. n. *Bell v. Gate*, 1 Taunt. 163. Vide *Richardson v. Murray*, 2 Bl. Rep. 1179.

(a) *Harper v. Tahourdin*, 1 Chit. Rep. 714. n. On such a recognizance, he must be sued by bill as an attorney, *How v. Bridgewater*, 1 Barnes, 117.

(b) *Boulange v. Vantum*, Cowp. 826. Doug. 466. n. *Laing v. Cundale*, 1 H. Bl. 76. *Cornish v. Ross*, 2 id. 349. *Stoneham v. Pink*, 3 Price, 263. *Fenton v. Ruggles*, 1 B. & P. 356.

(c) *Redit v. Broomhead*, 2 B. & P. 564.

(d) *Dixon v. Edwards*, 2 Anstr. 356.

(e) *Doldern v. Feast*, 2 Stra. 890. *Barnard*, K. B. 417. s. c. *Anon*, Loft, 153. (f) H. T. 8 Geo. 2. Reg. 7. C. B. 14 Geo. 2. Reg. 2. K. B.

Who may  
or may not  
be bail to  
the action.

Sheriff's  
officer, &c.

as it did not appear that the party was the county gaol-keeper, but might only be an officer of a particular corporation; though being immediately connected with the execution of process, will suffice to bring the party within this rule; (g) and accordingly in *Bolland v. Pritchard*, (gg) a person merely employed to summon juries was rejected as being a sheriff's officer, with the letter of the first part of the rule; and in *Hawkins v. Magnall*, (h) the keeper of the Poultry Compter was considered incapacitated, on the ground, it would seem, of being within the latter words of the rule, viz. "other persons concerned in the execution of process." A Marshalsea Court officer, (i) turnkey of the King's Bench Prison, (k) have respectively been rejected. The prohibition extends to officers of a different court, as well as of that in which the action is brought; (l) and notwithstanding the plaintiff may consent to waive the objection, the bail must be rejected to preserve an uniformity in the practice. (m) The consequence of putting in an attorney's clerk or sheriff's officer as bail, is the same as already noticed with regard to attorneys. (n)

Infants and  
feme co-  
verts.

As the contracts of infants (except for necessities) are voidable, and of married women absolutely void, neither infants (nn) nor feme coverts can be bail.

Incompe-  
tency from  
infamy of  
character.

Persons who cannot be credited on oath from want of moral rectitude, or whose credibility has been destroyed by a conviction for some infamous crime, are incapacitated from becoming bail; (o) as where the party has been

(g) *Faulker v. Wise*, 2 B. & P. 150.

(gg) 2 Bl. Rep. 799.

(h) Doug. 466.

(i) *Bolland v. Pritchard*, 2 Bl. 799.

(k) *Daly v. Brooshoft*, 2 D. & R. 359.

(l) Per Buller, J., *Hawkins v. Magnall*, Doug. 466.

(m) Ibid.

(n) *Banter v. Levi*, 1 Chit. Rep. 714. See ante, p. 270.

(nn) Prac. Reg. 68.

(o) As to the offences which will have this effect, see 1 Phil. Ev. 23. 3d edit. Peake, Ev. 124.

convicted of perjury. (p) But the circumstance of the bail having been transported thirty years ago, creates no disability, the period of his transportation having duly expired. (q)

Who may or may not be bail to the action.

The preceding grounds of incompetency of parties to become bail, were all of a personal description. The inability originating from temporary causes is now to be investigated. In treating of this subject it is proposed to consider, first, the incapacity arising from not being a housekeeper or freeholder; secondly, from insufficiency of property; thirdly, from other causes.

2d. Temporary incapacity.

The general qualification of bail, it has already been shewn, is, that they should be housekeepers or freeholders. The term "housekeeper," in its ordinary acceptation, conveys the idea of master of a family; but in its legal sense, with reference to the qualification of bail, it means a person actually occupying part or the whole of a house, being the party responsible to the landlord for the entire rent, and assessed or liable for the parochial rates and King's taxes. Requiring the bail to be housekeepers, is a salutary rule, as it excludes persons who have not a fixed, permanent, and known residence. (r)

Not being a housekeeper, &c. Housekeeper.

The bail must be in actual possession of part or the whole of the premises in respect of which he derives his legal appellation of a housekeeper. For where the bail had quitted the house in which he had formerly resided, and had taken another, but had been prevented from obtaining possession from a death in the family of the outgoing tenant, he was holden to be incompetent, as he could not conscientiously swear that he was a housekeeper, (s) and

(p) *The King v. Edwards*, 4 T. R. 440.

(q) *Hatfield's Bail*, 2 Chit. Rep. 98. As to party's competency being restored, see 1 Phil. Ev. 29. 3d edit.

(r) *Anon. Lofft*, 148.

(s) *Bold's bail*, 1 Chit. Rep. 288.

Who may  
or may not  
be bail to  
the action.

House-  
keeper.

a party having been a housekeeper at the time he agreed to become bail, is nevertheless disqualified, if he is not actually invested with that character at the time he appears to justify. (t)

It is not material that the bail should have the exclusive possession of the house, provided he resides on the premises, and is responsible for the taxes and entire rent. The latter qualification is essential; for where the bail occupied every room in the house but one apartment, which was reserved by the landlord for his own accommodation, he paying all the taxes, it was holden, under these circumstances, that he could not be considered as a housekeeper. (u) So bail was rejected who had taken a house and afterwards underlet it to another, who paid the taxes, and let the first floor to the bail; but the landlord refusing to accept the under-tenant, the rent for the whole of the premises was paid by the latter to the bail, who paid it over to the landlord; (x) though it is to be remarked that in *Hemming v. Plenty*, (y) bail was considered competent, notwithstanding the party did not live in the house in which he was described in the notice, it being the manufactory of himself and partner, the latter only residing there; this decision proceeded on the ground, that if persons thus situated were to be considered incompetent, it would lead to the rejection of many responsible persons, living at a distance from the house in which their business was conducted.

The rent paid by the tenant must be for a distinct and separate dwelling, and not for part of a larger building, although between the one and the other there is no internal communication; hence, a party who rented a tap

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(t) Anon. 1 Chit. Rep. 6.

(u) Slade's bail, 1 Chit. Rep. 502.

(x) Anon. 1 Chit. Rep. 502.

(y) 1 B. Moore, 529.

adjoining to a tavern, and which formed part of the latter building, was considered only an inmate or lodger, and not a housekeeper. (z)

Who may or may not be bail to the action.

House-keeper.

A person living in a house divided into several distinct sets of residences, but a principal occupier paying the rent and taxes of the whole, cannot be bail; though it seems, persons living in chambers, where each set of apartments constitute a distinct and independent dwelling, and each occupier is assessed, and liable for his separate parochial rates and taxes, would not be rejected. (a)

Under peculiar circumstances, a person occupying a house for a limited period, for which he pays neither rent nor taxes, is admissible; as where the party proposed as bail was allowed a house to live in during the period of his employment by the commissioners superintending some public works, exempt from any charge whatever, he was holden competent. (b)

It is not essential that the party should have been actually assessed to the taxes and parochial rates; it is sufficient if he be chargeable. (c)

If the bail be a housekeeper or freeholder, the amount of the rent of their houses or annual value of their freeholds is not material. (d)

The plaintiff may waive the qualification of the bail being housekeepers or freeholders; (e) hence, a beneficial leaseholder has been admitted by consent. (f)

Persons are incapacitated from becoming bail, who

Insufficiency of property.

(z) Walker's bail, 1 Chit. Rep. 316. In this case it appeared that the licence for the tap was taken out in the name of the tavern keeper.

(a) Lomax's bail, M. T. K. B. 1823. MS. Stapleton's bail, id. MS.

(b) Williams v. Dethick, 2 Price, 8.

(c) Anon. Lofft, 328. As to the effect of being unable to pay the taxes, see post, p. 279.

(d) Anon. Lofft, 148.

(e) Saggars v. Gordon, 5 Taunt. 174.

(f) Anon. 2 Chit. Rep. 96.

Who may  
or may not  
be bail to  
the action.

Insufficiency  
of property.

are not respectively worth double the amount of the sum endorsed on the writ, or one thousand pounds beyond the sum endorsed, if it exceed 1000*l.* after the complete payment and discharge of all their debts. The particular species of property in respect of which the qualification to become bail is created, is not material, provided it be in the party's own right, within the jurisdiction of the court, (g) and liable to the ordinary process of the law. (h)

The locality of the property is stated in some cases to be material; (i) but from other authorities it may be collected that the rule, requiring the property to be within the jurisdiction of the court, should not be invariably enforced. Hence, in a variety of instances, bail have been admitted where the property has been wholly abroad, or partly abroad and partly in England. A distinction has perhaps been correctly taken, though it does not appear to have been the criterion adopted by the courts, between the admissibility of a British subject, resident here, in respect of property out of the jurisdiction of the court, and foreigners domiciled abroad; with regard to the former, it should seem that the circumstance of his not having property in this country subject to the process of the court, constitutes no objection to his becoming bail; for otherwise, a person who had property in the funds, which cannot be taken in execution, would not be sufficiently qualified; though with regard to the latter, the objection appears reasonable and well founded, (k) as neither their property nor persons are within the reach of the process of the court: but as the

(g) Anon. 9 id. 97.

(h) 1 Sel. Prac. 161. Dobson's bail, H. T. 1823. MS.

(i) Boddy v. Leyland, 4 Burr. 2526. Wightwick v. Pickering, Forrest, 138. Anon. Loft, 54. 147. Graham v. Anderson, 4 M. & S. 371.

(k) 1 Chit. R. p. 286. n.



decisions on this subject are conflicting, it may be useful to consider the cases, 1st, with reference to the property being wholly abroad; 2dly, with reference to the property being partly abroad and partly in this country.

Who may  
or may not  
be bail to  
the action.

Property  
wholly  
abroad.

In *Smith v. Scandrett*, (l) where one of the bail had estates in Antigua, but no effects in England, the court declared that merely having no property in England, was not of itself a sufficient objection without other auxiliary circumstances; and upon this principle it was decided, that foreigners of credit, who have but few effects in England, may be admitted as bail, more especially where it appears that the original defendant is an alien. (m) Where one of the bail was a Portuguese, and owner of a ship which had for two years been trading between London and Boulogne, and had then sailed for Cadiz, from whence she was expected to return, and was insured in London; the Court of King's Bench admitted the bail, although it did not appear that he had any effects in England. (n) But in *Boddy v. Leyland*, (o) bail who were possessed of land in the colonies, were not considered sufficiently qualified; (p) so in the Common Pleas, bail stating himself to be a tenant by the curtesy of lands in the Isle of Man was rejected. (pp)

When some of the effects of the bail are in England and some abroad, the parties may be received as competent. In *Beardmore v. Phillips*, (q) the bail was admitted to be qualified in respect of property, consisting partly of cash and partly of a freehold house at Gibraltar; the same practice was adopted in *Graham v. Anderson*, (r)

Property  
partly  
abroad and  
partly in  
England.

(l) 1 Bl. Rep. 444.

(m) *Christie v. Tilleul*, 2 Bl. Rep. 1323.

(n) *Colson v. Carhordy*, cited Tidd, 295. 7th edit.

(o) 4 Burr. 2526.

(p) See *Wightwick v. Pickering*, Forrest, 138. Anon. Lofft, 34. 147.

(pp) *Tansey v. Napies*, 8 Taunt. 148.

(q) 4 M. & S. 173. more fully reported in 1 Chit. Rep. 285. n.

(r) 4 M. & S. 371.

Who may  
or may not  
be bail to  
the action.

Property  
partly  
abroad and  
partly in  
England.

and in that case, Mr. Justice Bayley, after the bail had been allowed, said, "that he had looked into the cases, and that they were contradictory, and that it must not be taken for granted that a party can justify in respect of property abroad, when he has no other property." (s) Where part of the property was daily expected in a ship from Buenos Ayres, the bill of lading having already arrived, the bail was admitted. (t)

Bankruptcy.

Bankruptcy does not, in general, incapacitate a party from becoming bail, if he has regularly obtained his certificate, and is in other respects duly qualified. (u) But uncertificated bankrupts, (x) or persons who have failed a second time, and have not under the second commission paid fifteen shillings in the pound, their future effects continuing liable, are not admissible; (y) notwithstanding it may appear that eighteen years have elapsed since the first composition with the creditors, and nine years since the bankruptcy. (z)

Even persons who have obtained their certificates, have been deemed incompetent, from extreme ignorance of the state of their affairs; as where the bail was possessed of considerable property, but did not know whether his estate, under a recent bankruptcy, had paid any dividend. (a) So a bankrupt who had been arrested several times since the issuing of the commission, was rejected, (b) so one did not know whether during the

(s) Lery's bail, 1 Chit. Rep. 285. n.

(t) Welsford's bail, id. n.

(u) Smith v. Roberts, 1 Chit. Rep. 9. 2 id. 78.

(x) Id.

(y) Mountain v. Wilkins, 1 Tidd. 295. 7th edit. Smith v. Roberts, 1 Chit. Rep. 9. Wade's bail, id. 293. It seems that bail under such circumstances would be competent, if they could swear they were worth the necessary sum after payment of their just debts, and after payment of the fifteen shillings in the pound upon the debts from which they have been discharged under the commission.

(z) Wade's bail, 1 Chit. Rep. 293.

(a) Prohatt's bail, 1 Chit. Rep. 288. Butler's bail, 2 Chit. Rep. 78.

(b) Rawlins's bail, 1 Chit. Rep. 3.

interval between his bankruptcy and obtaining his certificate, he had or had not justified as bail. (c)

Persons who have taken the benefit of the insolvent act, are precluded from becoming bail, as their future effects continue liable, (d) unless the debts from which they were discharged, under the statute, have since been paid. (e)

Who may  
or may not  
be bail to  
the action.

Insolvent  
debtors.

Besides the two preceding instances of public and declared insolvency, there are other facts of a doubtful and equivocal description, from which the party's incapacity to pay the amount for which he has become bail, may be inferred; as where the bail had permitted his father to receive parochial relief, (f) or allowed his children to be supported in the workhouse, (g) or recently arrested, (h) or was liable upon outstanding dishonoured bills (i) not renewed, or the right of proceeding, on those securities suspended, (k) or was unable to pay his arrears of the King's taxes, (l) or had been bail before in other actions, but did not know in how many, and for what sums, (m) or pretended to be able, but was unwilling to pay his own debts, (n) or had requested time, to discharge a small demand. (o)

Implied  
poverty of  
bail.

When persons have been once rejected as incompetent, it is a fixed and immutable rule, that they cannot afterwards be admitted, notwithstanding their pecuniary circumstances may have improved, and they may have become affluent, or the other grounds of their disqualifica-

Persons be-  
fore reject-  
ed as bail.

(c) Bennet's bail, 1 Chit. Rep. 289.

(d) Smith v. Roberts, 1 Chit. Rep. 9. Gould v. Berry, id. 143.

(e) Curtis v. Smith, 1 Chit. Rep. 116. Spurdens v. Mahoney, id. 309. n.

(f) Holm v. Booth, 2 Chit. Rep. 78.

(g) Anon. id.

(h) Newman's bail, 2 Chit. Rep. 95.

(i) Barnesdall v. Stretton, 2 Chit. Rep. 79.

(k) Id.

(l) Lewis v. Thompson, 1 Chit. Rep. 309.

(m) Lofft, 72. 194.

(n) Earl's bail, M. T. K. B. 1822. MS. Mill's bail, same term, MS.

(o) Gray's bail, same term, MS.

Who may  
or may not  
be bail to  
the action.

Persons be-  
fore reject-  
ed as bail.

tion have been removed.<sup>(p)</sup> This principle was adopted, to obviate the inconveniences that would necessarily attend an inquiry on subsequent occasions, to be made concerning the cause of the party's prior rejection. A similar practice obtains, whether the bail have been rejected in the same court, or in one of equal or inferior<sup>(q)</sup> jurisdiction.

It is said to have been decided, that where bail have been rejected on a former occasion, merely on the ground of having been indemnified by the defendant's attorney, that the preceding general rule does not apply; but the propriety of this relaxation from the established practice, may admit of considerable doubt; for if such exceptions were sanctioned, it would introduce the mischief intended to be avoided, by the principle, that bail once rejected and entered in the rejected book, stand always rejected.<sup>(r)</sup> Where bail, of whom notice had been given, having been rejected in another cause on the day in which they were intended to justify, were not offered for justification according to the notice, and on the next day, the defendant applied for time to add and justify, and to stay proceedings against the bail below, the bail court held that this could not be done in the absence of the plaintiff, who was unapprized of the motion.<sup>(rr)</sup>

To detect frauds by hired bail offering themselves to justify, after they have been rejected in other actions, a book is kept by the master in the King's Bench, in which the names and descriptions of rejected bail are entered.

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(p) Snell's bail, 1 Chit. Rep. 82. Waterhouse's bail, id. 307. Anon. id. 307. n. ——— v. Hullet, 1 D. & R. 488.

(q) Monk's bail, 1 Chit. Rep. 676.

(r) ——— v. Hullet, 1 D. & R. 488.

(rr) Watson v. Hinton, 1 Chit. Rep. 290.

According to an express rule of court in the Common Pleas, (s) and the settled practice of the King's Bench, (t) persons indemnified by the defendant's attorney, cannot be admitted as bail; for if this practice were allowed, it would be a mere evasion of the rule, that no attorney shall be bail. (u) A verbal promise of indemnity from the defendant's attorney, is sufficient to create this incompetency; as where the bail acknowledged on their examination, that they relied upon the honour of the defendant's attorney, to secure them from any loss, they were rejected; (x) but this ground of opposition is confined to cases where the guarantee has proceeded from an attorney, there being no impropriety in other persons indemnifying the bail. (y)

Who may or may not be bail to the action.

Persons indemnified by defendant's attorney.

Want of knowledge of the defendant has sometimes been urged as an objection against the admissibility of persons as bail, but this is only a mark of suspicion, capable of being explained; (z) and from a recent case, it would appear to afford no reason whatever for their rejection. (a)

Persons not knowing defendant.

The circumstance of the bail being liable to the plaintiff, on the same instrument on which the action is brought, will not render the bail incompetent, if he be otherwise qualified. Thus an indorser of a bill of Exchange may be bail for the drawer in an action against the latter upon the same bill, notwithstanding the apparent objection, that the plaintiff's security would not be increased by the recognizance of the indorser. (b)

Persons liable on the same instrument.

(s) R. H. 37 G. 3. C. P.

(t) *Preston v. Bindly*, M. 24 G. 3. K. B., cited 1 Tidd, 293. 7th edit.

(u) *Greensill v. Hopley*, 1 B. & P. 21. 103.

(x) *Idem*, 103. Thorp's bail, M. T. K. B. 1822. MS.

(y) *Neat v. Allen*, 1 B. & P. 21.

(z) Per Cur. M. 26 G. 3. K. B.

(a) *Jameson's bail*, 2 Chit. Rep. 97.

(b) *Harris v. Manley*, 2 B. & P. 526. *Mitchell's bail*, 1 Chit. Rep. 287. *Steven's bail*, id. 305.

## CHAP. VIII.

OF PUTTING IN, EXCEPTING TO, AND JUSTIFYING BAIL  
IN TOWN.

## SECTION I.

## OF PUTTING IN BAIL IN TOWN.

HAVING shewn the necessary qualifications to enable a person to become bail to the action, it will be proper here to consider, by whom, within what time, and in what manner, the bail is, as it is technically described, to be put in; or in other words, to examine the mode in which the condition of the bail-bond may be fulfilled.

By whom  
put in.

Many persons, in general, are interested in bail above being put in and perfected:—the defendant in the original action, the bail to the sheriff, the sheriff himself, or if an undertaking has been given, the attorney who gave it. Bail may therefore be put in by any of these parties for his own individual security; and the one having done so, will afford no impediment to the others. (a) It has, upon this ground, been determined, though the practice was formerly different, (b) that it is not necessary that the bail above should be put in by the attorney of the defendant, or that an order to change the attorney should be obtained; and it is now a settled principle, that bail below may appear and justify by their own attorney, or on the part of the sheriff by his attorney. (c)

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(a) *Wheeler v. Rankin*, 1 Chit. Rep. 81. *Key v. Tavernier*, id. 291. *The King v. Houghton*, id. 329. 2 B. & A. 604. s. c.

(b) 1 Chit. Rep. 329. n.

(c) *Haggett v. Argent*, 7 Taunt. 47. 2 Marsh. 365. s. c.

Of putting  
in bail in  
town.

By the  
bail to the  
sheriff.

As bail below are not permitted to render the defendant in their discharge, (d) it is essential to their security that they should have it in their power to put in and justify bail above, without obtaining the consent of the principal, and thus prevent an assignment of the bail-bond; hence, where the defendant appeared in court, and insisted that no bail whatever should be received, the court, notwithstanding this interdiction, ordered that bail should be admitted. (e) So where the defendant's attorney refused to instruct counsel to move that the bail might justify, until the costs up to the time of putting in bail were paid, and it was urged on the part of the defendants, that the bail to the sheriff could not be recognized, as they were not legally before the court; it was decided that they might appear by their own attorney, and put in and justify bail, independent of the defendant. (f)

On the same principle, bail may be put in by the sheriff or his officer, without the privity or consent of the defendant. (g)

By the  
sheriff.

An attorney, who has given an undertaking for the defendant, it seems, is entitled to adopt this mode of indemnifying himself against the consequences of his contract; though it is presumed that this right can only be made available where the undertaking has been given to the plaintiff in the suit, or his attorney, and not to the

By an attorney, in  
pursuance  
of his undertaking.

(d) *Berchere v. Colson*, 2 Stra. 876. *Huggins v. Bambridge*, Barnes, 83. 8 T. R. 457. s. c. n. *Newton v. Lewis*, Barnes, 88. 8 T. R. 457. s. c. *Hamilton v. Wilson*, 1 East, 382.

(e) *Berchere v. Colson*, 2 Stra. 876.

(f) *Haggett v. Argent*, 7 Taunt. 47. 2 Marsh, 365. s. c. See *Hill v. Roe*, 6 Taunt. 532. 2 Marsh, Rep. 257. Bail to the sheriff are *prima facie* liable to the attorney for costs of putting in bail above. *Hector v. Carpenter*, 1 Stark. 190.

(g) *Rex v. Butcher*, Peake's N. P. C. 168. *Wheeler v. Rankin*, 1 Chit. Rep. 81. *The King v. the Sheriff of London*, 2 B. & A. 604. 1 Chit. Rep. 329. s. c.

Of putting  
in bail in  
town.

When put  
in.

sheriff or his officers, the latter class of contracts having been repeatedly declared void. (*h*)

Bail above must be put in within the periods limited and prescribed for that purpose by the rules and practice of the different courts, otherwise the proceeding will be a nullity, and the plaintiff, at his election, may either take an assignment of the bail-bond, or proceed against the sheriff, as if no bail whatever had been tendered.

It was anciently considered that bail above could not be put in before the return-day of the writ, (*i*) or before the arrest had taken place, without the plaintiff's consent; (*k*) but this position has since been repudiated, and it seems now to be permanently settled, that there is no objection against the bail being put in before the return of the process, (*l*) although this mode of proceeding is seldom adopted, and bail is not usually put in until the expiration of a certain number of days after the return of the writ. When the defendant is in custody, bail may be put in at any time, even after verdict (*ll*) or final judgment, provided he has not been charged in execution. (*m*)

In K. B.  
within what  
time bail  
must be put  
in.

In the Court of King's Bench, the time for this purpose is thus regulated: Where the defendant is arrested in London or Middlesex, special bail must be put in within four days after the return of the process by bill, (*n*)

(*h*) *Rogers v. Reeves*, 1 T. R. 418—422. *Fuller v. Prest*, 7 id. 109. *The King v. the Sheriff of Surrey*, id. 239. *Sedgworth v. Spicer*, 4 East, 568. 2 Saund. 61.

(*i*) *Newton v. Lewis*, Barnes, 88. 8 T. R. 458. s. c.

(*k*) *Huggins v. Bambridge*, Barnes, 83.

(*l*) *Huggins v. Bambridge*, Barnes, 83. 8 T. R. 457. s. c. See *Hamilton v. Wilson*, 1 East, 383.

(*ll*) *Dyott v. Dunn*, 2 Chit. Rep. 72.

(*m*) *Hill v. Stanton*, H. T. 55 G. 3. K. B. cited 1 Tidd, 271. 7th edit. *Davis v. Fowler*, 2 Chit. Rep. 74. *Dyott v. Dunn*, id. 72. *Stanton's bail*, id. 73.

(*n*) R. M. 8 Ann. 1. K. B. former rule, E. 11 W. 3. reg. 2. K. B. 1 Crompt. Prac. 57. Anon. Lofft, 190.



or if the action be by original, within four days after the *quarto die post*, or eight days after the return; (o) and when the arrest has been made in any other county, bail must be put in within six days, in full term, after the return of the process, or after the *quarto die post*, when by original. (p)

Of putting  
in bail in  
town.

In the Court of Common Pleas, on process returnable the first return of the term, special bail should be put in within four days, in London or Middlesex, or in any other city or county, within eight days after the *appearance-day* or *quarto die post* of the return of the process; (q) but on process returnable, the second, or any other subsequent return of the term, special bail should be put in within four days in London or Middlesex, or in any other city or county, within eight days after the return of the process, or day on which it is actually returnable. (r)

In the C. P.

In the Court of Exchequer the defendant has four days exclusively allowed him for putting in bail in London and Middlesex; or in any other county, eight days, if the process be returnable on a day in full term; but it is the peculiar practice of that court, if a *quo minus* be returnable on the *essoign* day of the term, to calculate the day inclusively. Thus, upon a writ returnable upon the morrow of All Souls, the defendant is bound to put in bail (in London or Middlesex) on the 9th of November; whereas, if the writ be returnable on the 6th, which is the first special return of the term, he has all the 10th to put in bail. (s)

In the Ex-  
chequer.

Subject to the distinction just noticed, the days are computed exclusive of the return day, whether the process be returnable on a general return day, or a day certain.

Days, how  
computed.

(o) *Frampton v. Barber*, 4 T. R. 377.

(p) *Ibid.*

(q) *Rolfe v. Steele*, 2 H. Bl. 276.

(r) *Impey*, Prac. C. P. 196.

(s) 1 Price, Rep. 104.

Of putting  
in bail in  
town.

May be put  
in on dies  
non juridi-  
cus.

Of obtaining  
time to put  
in bail.

Where, and  
how put in  
in the K. B.

When the limited number of days expires upon a Sunday, the whole of the following Monday is allowed to put in bail; (t) but with this exception, bail above may be put in on a day the courts do not sit, a *dies non juridicus* being considered as a day for such business as can be transacted at the judges' chambers. (u)

If a more extended period than the time allotted by the rules of court be requisite to enable the party to put in bail, it may be obtained by taking out a summons, and submitting to the usual terms of placing the plaintiff in the same situation as he would have been if the bail had been put in in due time; but as a summons is no stay of proceedings, it ought to be obtained in sufficient time to have an order drawn up before the regular period for putting in bail has elapsed; though, where a rule nisi has been obtained, even for another purpose, and it is part of the rule, that proceedings in the mean time shall be stayed, the time for putting in bail is also necessarily suspended. (x) Granting further time to pay the debt does not necessarily include an enlargement of the time to put in and perfect bail. (y)

The bail must be put in in the court out of which the process issued, and with the proper officer.

In the King's Bench, in actions by bill, the bail are put in before a judge in town, at his chambers or private house, or in actions by original, with the filazer, or his clerk, who attends the judge, and enters the recognizance in a book of the county, into which the capias issued. It is important that the bail should be put in with the filazer of the proper county; and if there be any irregularity in this respect, they may be treated as a nullity, and the

(t) *Studley v. Sturt*, 2 Stra. 782.

(u) *Baddeley v. Adams*, 5 T. R. 170.

(x) *Swayne v. Crammond*, 4 T. R. 176.

(y) *The King v. the Sheriff of Middlesex*, H. T. 1823. K. B. MS.

plaintiff may proceed as if no bail (*yy*) had been given ; hence, bail on a *testatum capias* from Middlesex, put in where the writ has issued (*z*) or executed, (*a*) and not in Middlesex, is unavailable, though this mistake may be aided by the insertion of explanatory words in the bail-piece, importing that the bail was put in upon a Middlesex original ; as where the defendant was arrested on a *testatum capias* in Kent, the original being in Middlesex ; and bail was put in in Kent, the name of that county being inserted in the bail-piece ; but in the margin, were these words “ *testatum from Middlesex,*” the court considered the proceedings regular, and set aside the attachment against the sheriff. (*b*) Where an inaccuracy of this kind has been committed, the courts, on the defendant’s consenting to pay the costs incurred, and to allow the attachment obtained against the sheriff to remain as a security, will indulge him with time to enable him to put in bail with the proper officer. (*c*)

Of putting  
in bail in  
town.

Where, and  
how put in  
in the K. B.

Prior to the bail attending at the judge’s chambers to enter into the necessary recognizance, it is requisite in actions by bill, that an instrument called a bail-piece should be prepared by the defendant’s attorney. This document may be considered both as instructions to the officer, and the foundation of the recognizance. It must contain a correct statement of the term in which the bail is put in, the county into which the writ issued, the

Bail-piece.

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(*yy*) *Garnett v. Heaviside*, Barnes, 63. *Clempson v. Knox*, 2 B. & P. 516. *Fisher v. Levi*, 2 Bl. Rep. 1061. *Harris v. Calvert*, 1 East, 603. *The King v. the Sheriff of Middlesex*, 3 M. & S. 532. *The King v. the Sheriff of Middlesex*, 1 Chit. Rep. 237. *Longworth v. Healey*, 3 B. Moore, 76. *Smith v. Miller*, 7 T. R. 96.

(*z*) *Clempson v. Knox*, 2 B. & P. 516.

(*a*) *Fisher v. Levi*, 2 Bl. Rep. 1061.

(*b*) *The King v. the Sheriff of Middlesex*, 3 M. & S. 532.

(*c*) *Clempson v. Knox*, 2 B. & P. 516. *The King v. the Sheriff of Middlesex*, 1 Chit. Rep. 237. *The King v. the Sheriff of Middlesex*, 3 M. & S. 532.

Of putting  
in bail in  
town.

 Bail-piece.

names of the parties to the suit, (d) the names and additions of the bail, and the amount of the debt sworn to. (e) A material defect in any of these particulars will vitiate the act of putting in bail. Thus, where the county of Middlesex was inserted in the bail-piece, instead of Surrey, the proceedings were deemed irregular. (f) So where, in an action at the suit of two, bail were put in, as in an action at the suit of one, it was decided that they might be treated as a nullity. (g) And the courts have refused to permit an amendment in the names of the parties on the bail-piece, without the consent of the bail, (h) though, under such circumstances, they have allowed the bail to justify a second time. (i)

The parties to the suit should be described as in the process, unless the defendant has been called by a wrong name, and he intends to avail himself of the misnomer; in this case, he should be designated in the bail-piece by his right name, suggesting that he was arrested by the appellation incorrectly adopted in the writ; for if he appear and perfect bail by his right name, without identifying himself as the person sued by the other name, the plaintiff may treat the bail as a nullity and attach the sheriff. (k) It is also material that the defendant should not

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(d) In *Calvert v. Bowater*, 1 Price, 385. the court permitted a justification where the title of the cause was incorrectly set out in the bail-piece.

(e) *Faget v. Vanthiennen*, Barnes, 59.

(f) *Smith v. Miller*, 7 T. R. 96. *Garnett v. Heaviside*, Barnes, 63. *The King v. the Sheriff of Middlesex*, 3 M. & S. 532.

(g) *Anon.* 2 Chit. Rep. 77. *Holt v. Frank*, 1 M. & S. 199.

(h) 1 Barnard, 214. *Bingham v. Dickie*, 5 Taunt. 814. *Croft v. Coggs*, 4 B. Moore, 65. *Anon.* 3 Price, 36. contra.

(i) MS. Easter, 1814. cited Archbold, Prac. 81.

(k) *Rex v. the Sheriff of Suffolk*, 4 Taunt. 818. The sole question is, whether a man putting in bail in one cause, can satisfy the writ when he has been arrested in another cause. Per Mansfield, C. J. See *Crofts v. Coggs*, 4 B. Moore, 165:

recognize the name used in the process without noticing the inaccuracy, for if he were to put in bail in the wrong name, it would conclusively estop him from pleading the misnomer in abatement ; (l) and as the fact of appearing by putting in bail is considered as the defendant's own act, this rule applies though he himself be no party to the recognizance. (m)

Of putting  
in bail in  
town.

Bail-piece.

By the general stamp act, bail-pieces are made subject to a duty of two shillings and sixpence. (n)

After the bail-piece has been prepared, the bail should attend at the judge's chambers, accompanied by an attorney, who delivers the bail-piece with a warrant to defend, to the judge's clerk, when the latter, in actions by bill, addresses himself to the bail in the following terms : " You (naming the bail,) do jointly and severally undertake that if C. D. shall be condemned in this action at the suit of A. B. he shall satisfy the costs and condemnation, or render himself to the custody of the Marshal of the Marshalsea of the Court of King's Bench, or you will do it for him. Are you content ?" The acquiescence of the bail to these conditions, is called entering into a recognizance, and their liability as bail immediately commences.

It is essential that the recognizance should correspond with the process, in the number and description of the parties to the suit ; for where in an action at the suit of two, bail were put in as in an action at the suit of one, it was determined that that mode of proceeding was irregular, and that the bail might be treated as a nullity ; (o) though, if in the recognizance the cause be properly de-

(l) *Stroud v. Gerrard*, 1 Salk. 8. *Smithson v. Smith*, Barnes, 94., Willes, 641. s. c. *Doo v. Butcher*, 3 T. R. 611. *Croft v. Coggs*, 4 B. Moore, 65.

(m) *Meredith v. Hodges*, 2 N. R. 453.

(n) 55 Geo. 3. c. 184. sched. part 2.

(o) Anon. 2 Chit. Rep. 77. *Holt v. Frank*, 1 M. & S. 199.

Of putting  
in bail in  
town.

  
Bail-piece.

scribed, it is sufficient; and the circumstance of the parties being misnamed in the affidavit of sufficiency, and of the acknowledgment of bail, will not invalidate the recognizance. (p) A recognizance of bail given in an action against two, ("in case the said C. and D. should happen to be condemned,") is forfeited by the condemnation of either; for that meets the spirit, though not the letter of the recognizance. (q)

In actions by original writ, a note or memorandum in writing should be prepared, containing the same particulars as the bail-piece.

The recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to, or one thousand pounds beyond that sum, if it exceed one thousand pounds.

When the bail is put in after final judgment, (r) the recognizance is taken in double the amount of the sum recovered.

Where, and  
how put in  
the C. P.

In the Common Pleas, the bail is put in with the filazer of the county into which the *capias* issued. (s) That officer is usually in attendance at the judge's chambers, and on being furnished with an abstract of the writ, and the names and additions of the bail, he will make an entry thereof in a book kept for that purpose; or the bail may be taken, in the absence of the filazer, by the judge's clerk on producing a true abstract of the writ. (t)

Formerly the defendant in the Common Pleas might have entered into the recognizance of bail himself, and in that case he was bound in double the sum sworn to, and each of the bail in the single sum only; (u) but now,

(p) *Lowe v. Galloway*, 5 Taunt. 668. As to an affidavit of sufficiency, vide post, cap. 9.

(q) *Wilkinson v. Thorley*, 4 M. & S. 33.

(r) *Stanton's bail*, 2 Chit. Rep. 73.

(s) R. T. 1 W. & M. reg. 2. C. P. *Fisher v. Levi*, 2 Bl. Rep. 1061. *Clempson v. Knox*, 2 B. & P. 516. *Longworth v. Healey*, 3 B. Moore, 76.

(t) H. 8 Geo. 2. C. P.

(u) *Dahl v. Johnson*, 1 B. & P. 205.

by a late rule of court, in all actions requiring bail, the defendant shall not be permitted to enter into the recognizance, but each of the bail shall enter into a recognizance in double the sum sworn to, (x) or one thousand pounds beyond that sum, if it exceed one thousand pounds. (y)

Of putting  
in bail in  
town.

Where, and  
how put in  
the C. P.

The entry of bail in the filazer's book is of the term generally, and of course relates to the first day of it; and, therefore, in an action on a bail-bond, if the issue depend on the date of the appearance, the court, in furtherance of justice, will order the actual day to be recorded, instead of allowing it to remain of the term generally, although issue has been already joined on the plea of *comperuit ad diem*. (z)

In the Exchequer, bail above are put in at one of the baron's chambers, for which purpose a bail-piece comprising the same particulars as required in the King's Bench, must be prepared. It has been suggested, that in this court it is not usual to insert in the bail-piece, the name of the county into which the process issued, (a) but this opinion does not appear consonant with the present practice. The words used in taking the recognizance in this court, are as follows: "You do jointly and severally agree, that if the defendant shall be condemned in this action, and shall not satisfy the condemnation, or render his body to the prison of the Fleet, that your body, lands, and goods, shall be liable to satisfy the condemnation."

When, and  
how put in  
in the Ex-  
chequer.

As much injustice would ensue from permitting the bail thus taken and recorded, to be absolute and binding upon the plaintiff, without allowing him an opportunity

Notice of  
bail.

(x) 1 B. & B. 486.

(y) 3 Taunt. 841.

(z) *Austen v. Fenton*, 1 Taunt. 23.

(a) 1 Burr. 126. See 1 Manning, Ex. Prac. 101.

Of putting  
in bail in  
town.

Notice of  
bail.

of inquiring into their character and sufficiency, it was at an early period ordered, "that no bail taken before a judge in his chambers, shall bind the plaintiff without his assent thereto, or the confirmation of such bail by all the court." (b) To render this rule effective, and to afford the plaintiff the means of ascertaining the responsibility of the bail, it is incumbent upon the defendant to give the plaintiff immediate notice that they have been put in, where they are to be found, and their situation of life. (c)

The rule that the bail are not to be esteemed absolute in the first instance, does not affect the plaintiff's right to dispense with any inquiry, and at once acknowledge their competency; but as this immediate acquiescence is unusual in practice, it will be necessary to examine within what time notice of bail should be given, the requisite statements to be introduced in the notice, and the manner in which it should be served.

Within what  
time notice  
of bail  
should be  
given.

In the Court of King's Bench it was formerly a rule, (d) that notice of bail ought to be delivered to the plaintiff's attorney, preparatory to its being put in, and he was required to attend before a judge and immediately elect to accept the bail as competent persons, or at once oppose their admission; but the modern practice is different, and notice of bail is not now given until after it has been put in, though it ought regularly to be served before the time appointed for that purpose has expired. The circumstance, however, of the notice not having been given until after the limited period for putting in bail has elapsed, will not entitle the plaintiff to have an assignment of the bail-bond, if he has been actually

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(b) See *Timberley's case*, 2 Sid. 91. *Manning's Ex. Prac. App.* 243.  
(c) R. M. 16. Car. 2. K. B.  
(d) R. M. 7 Jac. 1. K. B.



served with notice prior to such assignment being obtained. (e)

Of putting  
in bail in  
town.

Anterior to a recent regulation, (f) where the bail was put in within the appointed time in the Common Pleas, the defendant was not compelled to give notice of that event, but the plaintiff was obliged to search in the filazer's book, and a distinction appears to have been taken between when they were put in in due time, (g) and when not; but these differences have been removed by a rule of court, which orders "that when special bail is put in for the defendant, a notice in writing of such bail being so put in, must be forthwith given to the plaintiff's attorney or agent, and special bail shall not be considered as put in until such notice shall be given."

Within what  
time notice  
of bail shall  
be given.

The notice of bail having been put in, should be entitled of the court in which the action was brought, and in the name of the original cause. It must contain a true, accurate, and minute description of the place where, and the person before whom, the bail were put in, their names, and addition of degree or mystery, and places of abode.

Requisites  
of the  
notice of  
bail.

The name of the cause in which the parties have become bail, should not only be correctly described, but where there are several joint plaintiffs or defendants, the number mentioned in the notice should correspond with the number of the parties to the suit. (h)

Name of  
the cause.

The bail should be described by the christian (i) and surname by which they are generally known. A material variance or omission in this particular, will invalidate the

Names of  
the bail.

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(e) Anon. cited Tidd, 278. 7th ed. n.

(f) R. E. 49 Geo. 3. C. P. 1 Taunt. 616.

(g) Dawkins v. Reid, 1 H. Bl. 529.

(h) Anon. Lofft, 237.

(i) Taylor v. Halliburton, 1 Chit. Rep. 494. n. 351. Jeffery's bail, 1 Chit. Rep. 351.

Of putting  
in bail in  
town.

Names of  
the bail.

Place of  
abode of the  
bail.

notice. (*k*) Thus a misnomer in the recognizance and notice of bail, by calling one of them Frances instead of Francis, is a good ground of exception; (*l*) and bail have been rejected because one of them was described in the notice, as James Mellon generally, but in the affidavit of justification he was entitled James Mellon the younger; (*m*) as the court would infer, that there was another person of the same name, to which the general designation in the notice would more properly apply.

In describing the place of abode in the notice, it is not sufficient merely to state in vague and general terms the parish, district, or town in which the bail reside; but the street, (*n*) square, or other subdivision, when it bears a distinct and known appellation, should be accurately set forth; (*o*) though, if the direction be in other respects intelligible and exempt from ambiguity, an omission to state the parish in which the house is situate, will not be material. (*p*)

Bail who reside in one place and carry on their business at another, may be properly described as of the latter place. (*q*)

Whenever the plaintiff has had sufficient time to inquire after the solvency and competency of the bail, (*r*) or has, in fact, discovered their residence, (*s*) it is a rule, not to reject them on account of any defect in describing their address in the notice.

Where, from the length of the street, or extent of po-

(*k*) Anon. Lofft, 237:

(*l*) 1 B. Moore, 126.

(*m*) Smith v. Mellon, 1 Marsh, 386. 5 Taunt. 854.

(*n*) Anon. Lofft, 72.

(*o*) Anon. 6 Mod. 24. Anon. 11 id. 2. Anon. Lofft, 187. 281.  
v. Costar, 5 Taunt. 554. Atkinson's bail, 2 Chit. Rep. 86.

(*p*) Anon. Lofft, 418.

(*q*) Weddall v. Berger, 1 B. & P. 325.

(*r*) Anon. 1 Chit. Rep. 492, 493. Well's bail, id.

(*s*) Taylor's bail, 1 Chit. Rep. 503.

pulation, difficulty would be created by an omission to insert the number of the house, the particular number should be stated; and a misdescription would be sufficient ground for rejecting the bail. (t) And if they be described of a large town, such as Leeds, (u) Liverpool, (x) Lancaster, (y) Leicester, (z) the town and county of Nottingham, (a) or the like, without further particulars to guide the plaintiff in his inquiries, it will be defective.

Of putting  
in bail in  
town.

Number  
and particu-  
lar descrip-  
tion of the  
place of  
abode.

A description of bail as of one of the large villages or districts in the vicinity of London,—as Clapham (b) or Walworth, (c) or Battle-bridge, (d) or Bermondsey New Road, Surrey, (e)—is too vague and general, if the place where the bail reside is known by a more particular designation. The court, however, will not judicially take notice of the extent or population of the neighbourhood, of which the bail are residents; and if the description be too vague and indefinite, from the length of the street or size of the district, (f) that fact should be established by affidavit. (g)

The notice may be rendered invalid by various directions being adopted in different notices of the same bail; as where, in the first notice they were described as living in Saint Martin's-le-grand; in the second notice, as of Rathbone-place; and in the last, as in Tottenham-court Road. (h)

Variance  
between  
different  
notices.

(t) Anon 1 Chit. Rep. 493. Taylor's bail, id. 503. Anon. M. T. H. B. 1821. Per Holroyd, J., MS.

(u) Baxter's bail, 6 B. Moore, 44.

(x) Jackson's bail, 1 Chit. Rep. 493.

(y) Id. 492. n. (z) Id.

(a) Per Curiam, 59 Geo. 3. cited 1 Tidd, 289. 7th ed.

(b) Rickman v. Hawes, 5 Taunt. 173. Sed vide Piesse v. Gibson, 6 B. Moore, 332, aliter. (c) 1 Chit Rep. 493.

(d) King's bail, 2 Chit. Rep. 81:

(e) ——— v. Costar, 5 Taunt. 554.

(f) Anon. Loft, 72, 194.

(g) ——— v. Costar, 5 Taunt. 554.

(h) Proteus's bail, 1 Chit. Rep. 493. n:

Of putting  
in bail in  
town.

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Addition of  
the bail.

Besides the place of residence, it is necessary that the notice should contain a statement of the degree, mystery, trade, or profession of the persons put in as bail; and an omission to describe the avocation or rank of the bail is a fatal objection; (i) but if the statement be full and accurate enough to enable inquirers to ascertain the situation of the bail, although it be not technically correct, it will suffice. Hence a schoolmaster, (k) or a clerk in the Custom-house, (l) may be described as a gentleman; (m) and the term manufacturer, (n) grocer, (o) baker, (p) or butcher, (q) is sufficiently explicit; but a servant (r) cannot designate himself as a gentleman; and the circumstance of such persons having temporarily seceded from their usual avocations, will make no difference, (s) if they have not permanently retired from business. The general expression "shopkeeper," without further particularizing the precise nature of the employment of the bail, is a sufficient description, unless suspicious circumstances indicate that the general term was adopted, in order to mislead the plaintiff. (t)

Where the same persons as were bail to the sheriff become bail above, it is usual to mention that circumstance in the notice; and when an assignment of the bail-bond has been taken, it is indispensably necessary that they should be so identified. (u)

Service of  
notice

As the bail are not considered to be put in until information of that event has been communicated to the op-

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(i) Anon. 6 Mod. 24. Anon. 11 id. 2. Lofft, 187. 281. ——— v. Costar, 5 Taunt. 554. Atkinson's bail, 2 Chit. Rep. 86.

(k) ——— v. Pasman, 5 Taunt. 759.

(l) 1 Chit. Rep. 494.

(m) As to the meaning of this word, see 2 Inst. 668.

(n) Smith v. Younger, 3 B. & P. 550.; and see Anon. 6 Taunt. 73.

(o) 1 Chit. Rep. 494.

(p) 2 Taunt. 173, 174.

(q) 1 Chit. Rep. 76.

(r) 1 Chit. Rep. 494.

(s) 1 Chit. Rep. 76.

(t) 1 Chit. Rep. 494. n.

(u) See 1 Archbold's Practice, 82.

posite party, it is essential that notice of their having been put in should be given without delay. (x) When the notice cannot be served personally upon an individual in the attorney's office, putting in a copy through the door of his chambers, the receipt of it being subsequently acknowledged, and affixing another copy in the King's Bench office, will suffice. (y) And where the plaintiff sued in person, and his residence was unknown, the Court of Common Pleas directed that putting up a notice in the Prothonotary's office, should be deemed good service. (z) When the attorney is absent from chambers during the ordinary office hours, it will be sufficient to deliver the notice to a person who usually receives his papers ; (a) and therefore, service at a law-stationer's, the usual place of the attorney's resort, has been considered good. (b) But some privity or connexion between the attorney and the party with whom the notice is left, (c) should be shewn.

Of putting  
in bail in  
town.

Service of  
notice.

## SECTION II.

### ACCEPTING OF, OR EXCEPTING TO BAIL.

WHEN bail have been put in, and notice of that event has been duly served, it is optional with the plaintiff, whether he will acknowledge their competency, and accept them as sufficient, or deny that they are qualified, and oppose their admission, and compel them to esta-

Accepting  
of bail.

(x) R. M. 16. Car. 2.

(y) 1 Chit. Rep. 294. *Atkinson v. Thompson*, 2 Chit. Rep. 81.

(z) *Ward v. Nethercoate*, 7 Taunt. 145.

(a) *Thompson's bail*, 2 Chit. Rep. 87.

(b) *Anon.* 2 id. 82. (c) *Freeman's bail*, id. 88.

Accepting  
of, or ex-  
cepting to  
bail.

Accepting  
of bail.

blish, by personal examination, that they are proper persons to be bail.

The acknowledgment of the sufficiency of bail may be either in express terms, or by implication; the former is sometimes, though not usually, conceded; the latter is more frequent, and may result from a variety of acts. Thus, if the plaintiff does not protest against the competency of the bail, by entering an exception against them, within twenty days after service of the notice, they will become absolute, and their sufficiency cannot be afterwards disputed. (d) And when such an implied admission of the competency of bail and regularity of the defendant's proceedings has been made, the plaintiff, in the King's Bench, cannot consider the bail as a nullity, and take an assignment of the bail-bond, notwithstanding the bail put in were attorneys or attorney's clerks, or other persons interdicted by a positive rule of court from becoming bail. (e) But in the Common Pleas, where the disqualification is created by an express rule of court, the bail may be treated as a nullity, and an assignment taken of the bail-bond, without an exception to the bail being first entered. (f)

Any act which admits the defendant to be in court, will preclude the plaintiff from afterwards objecting to the bail. Delivering a declaration in chief, is therefore

(d) R. M. 16 Car. 2. K. B. R. T. 5 W. & M. R. M. 8 Ann. R. 2. In actions by bill, the defendant's attorney should obtain the bail-piece from the judge's clerk, and file it with the signer of the writ. In actions by original, the note or memorandum in the notice of a bail-piece always remains with the filazer.

(e) Thomson v. Roubell, 2 Doug. 467. n. The King v. the Sheriff of Surrey, 2 East, 181. Huggins v. Bambridge, Barnes, 81.

(f) Fenton v. Ruggles, 1 B. & P. 356. Wallace v. Arrowsmith, 2 B. & P. 49. Bell v. Gate, 1 Taunt. 162. Richie v. Gilbert, id. 164. n. Cakish v. Ross, id.

an implied acknowledgment that the bail are competent, and if an exception be then entered, it may be treated as a nullity; (g) but delivering a declaration *de bene esse* or conditionally, is no waiver of the plaintiff's right to except, though even in that case, the demand or acceptance of a plea will relieve the bail from the necessity of justifying. (h)

Accepting  
of, or ex-  
cepting to  
bail.

Accepting  
of bail.

When the same persons as were bail to the sheriff become bail above, the plaintiff cannot, in the Court of King's Bench, after taking an assignment of the bail-bond, object that they are ineligible; for the mere act of accepting an assignment of the bond, is a conclusive admission of their competency; (i) but where the entering of exception to the bail has preceded the assignment of the bond, the exception is valid, and the bail are bound to justify. (k)

In the Court of Common Pleas it is a rule, that notwithstanding the bail to the sheriff become bail above, the plaintiff may except to them. (l)

Where the plaintiff has neither expressly accepted the bail, nor impliedly recognized their competency, by committing any of the preceding irregularities, and intends to oppose their becoming absolute, he must enter an exception to them, and give notice thereof within the limited number of days prescribed by the rules and practice of the courts. (m)

(g) R. M. 8 Ann. Reg. 1 (c) K. B. *Friend v. Mullens*, Ca. Prac. C. P. 81. *Lister v. Wainhouse*, Barnes, 92. *Walsh v. Haddock*, Ca. Prac. C. P. 155.

(h) *Lister v. Wainhouse*, Barnes, 92.

(i) Anon. 1 Salk. 97. *Grovenor v. Soame*, 6 Mod. 129. *Fish v. Horner*, 7 Mod. 62. *How v. Granville*, id. 117.

(k) *Hill v. Jones*, 11 East, 321.

(l) *Boughton v. Chaffey*, 2 Wils. 6. *Ormond v. Griffith*, Barnes, 63.

(m) R. M. 8 Ann. Reg. 2. a. 1 Salk. 98. Anon. 6. Mod. 24. *Ditmasdale v. Nielson*, 2 East, 405.

Accepting  
of, or ex-  
cepting to  
bail.

Entering,  
exception,  
and giving  
notice  
thereof in  
K. B.

In the Court of King's Bench, in actions commenced by bill, the exception must be entered in a book kept for that purpose, at the judge's chambers, within twenty days after notice of bail (*n*) has been put in or filed; or in action by the original, in the filazer's book (*o*) within the same period; and when the last of the twenty days happens on a Sunday, the exception may regularly be entered, and notice given on the Monday. (*p*) If the exception be not entered within the time prescribed, they become absolute and irremovable. Giving notice of exception, without the exception being duly entered, is a nullity, and the subsequent proceedings will be irregular. Nor is such an omission waived by the defendant having given two notices of justification, under one of which the bail may have justified, and the court in this case stayed proceedings in an action upon the bail-bond. (*q*) The necessity of entering an exception is, however, confined to instances where the bail have been put in in due time; for if they be not put in until after the expiration of the period limited for that purpose, they are bound to justify, whether they have been excepted to or not. (*r*) And where, under such circumstances, they have omitted to justify, the plaintiff may take an assignment of the bond, and proceed thereon, as if no bail had been put in. (*s*)

After an exception to the bail has been entered, notice of that step having been taken, should be given to the

(*n*) R. M. 8 Ann. Reg. 2. a. 1 Salk. 98. Anon. 6. Mod. 24. Dimsdale v. Nielson, 2 East, 405.

(*o*) R. E. 2 Geo. 4. K. B. (*p*) Oldham v. Burrell, 7 T. R. 26.

(*q*) Hodson v. Garrett, 1 Chit. Rep. 174. The bail-piece should be filed by the defendant's attorney within four days after the expiration of the twenty days, R. M. 16 Car. 2 K. B.

(*r*) Fuller v. Prest, 7 T. R. 109. Turner v. Carey, 7 East, 607.

(*s*) Nunn v. Rogers, 2 Chit. Rep. 108. et supra.



defendant's attorney. (t) Entering an exception without serving a corresponding notice, is nugatory. (u) The notice is usually served immediately after the exception has been entered; and to render it available, it *must* be given within twenty days after the service of the notice of bail. (x)

Accepting  
of, or ex-  
cepting to  
bail.

Entering,  
exception,  
and giving  
notice  
thereof in  
K. B.

The notice of exception ought to be in writing, (y) and should be correctly entitled both with reference to the court and the name of the cause; for when the notice of exception was entitled "in the Lord Mayor's court," instead of "in the King's Bench," it was considered a nullity, and an attachment obtained against the sheriff was set aside. (z) So where the notice of exception was not entitled in any cause, it was holden irregular, and that the circumstance of its having been delivered with the declaration, would make no difference. (a)

A notice of justification of bail is as between the parties, a waiver of any irregularity in the notice of an exception, (b) though it would not be a waiver with respect to the sheriff, so as to prevent him from objecting to the irregularity when ruled to bring in the body. (c) And it has been before shewn, that the right to take advantage of an omission or irregularity in entering the exception,

(t) R. M. 8 Ann. Reg. 2 Car. R. E. 2 Geo. 2 R. E. 5 Geo. 2. Reg. 1.

(u) Satchwell v. Lawes, Barnes, 88. Goswell v. Hunt, id. 101.

(x) Oldham v. Burrell, 7 T. R. 26.

(y) Cohn v. Davis, 1 H. Bl. 80.

(z) Anon. 1 Chit. Rep. 374. See Harvey v. Morgan, 2 Stark. 17:

(a) Rex v. the Sheriff of Middlesex, 1 Chit. Rep. 742. The notice of exception must be a perfect instrument in itself, and the mere delivery of a notice, not entitled in any cause with the declaration, is not sufficient. We ought not to encourage a plaintiff under these circumstances, because the step he takes almost inevitably leads to some application to the court. Per Abbott, C. J.

(b) Cohn v. Davis, 1 H. Bl. 80.

(c) Id. Rogers v. Mapleback, id. 106.

Accepting  
of, or ex-  
cepting to  
bail.

Entering,  
exception,  
and giving  
notice in  
the C. P.

In the Ex-  
chequer.

Within what  
time bail  
must justify  
after excep-  
tion in K.B.  
and Exche-  
quer.

Within  
what time  
bail are to  
justify in  
the C. P.  
after excep-  
tion.

is not waived by the defendant serving a notice of justification. (d)

In the Court of Common Pleas, the exception in London and Middlesex is entered in the filazer's book, and the same rules as to the time of entering the exception, giving notice thereof, and waiving the exception, obtain as in the King's Bench. (e)

In the Court of Exchequer exception is not entered on the bail-piece, but is given as a separate paper, to the defendant's attorney or clerk in court.

After an exception has been entered against the bail in term-time, and due notice thereof given, the bail in the King's Bench and Exchequer must justify within four days. After service of such notice, a defendant may add other bail, who must justify within the same four days; or if exception be entered in vacation, upon the first day of the subsequent term. (f) And unless there be four days in term after notice of exception, the bail need not justify until the first day of the ensuing term. (g) In the computation of these days they are calculated exclusively. Thus, if the last of the four days fall on a Sunday or Monday, the defendant has the following Tuesday to justify bail; if on a Thursday, he has the following Friday.

In the Court of Common Pleas it is ordered, (h) that if special bail, put in by the defendant, be excepted to, the defendant shall perfect his bail within four days after ex-

(d) Ante.

(e) *Busby v. Walker*, Coke's Rep. 55. *Satchwell v. Lawes*, Barnes, 88. *Hodson v. Garrett*, 1 Chit. Rep. 174. *Goswell v. Hunt*, Barnes, 101. *Prac. Reg. C. P.* 77.

(f) R. E. 5 Geo. 2. K. B., R. T. 3 & 4 Geo. 2. C. P., 25 & 27 Geo. 2. Exch. (g) 2 Sel. Prac. 156.

(h) R. T. 3 & 4 Geo. 2.

ception taken, in default whereof, the plaintiff shall be at liberty to *proceed on the bail-bond*; and of these four days, the first is reckoned exclusively, and the last inclusively; so that when the exception is entered on *Wednesday*, an attachment cannot regularly issue against the sheriff till Tuesday following, Sunday being considered as a *dies non*. (i) In the case by which this rule is established, although the attachment had improperly issued on the Monday, the court refused to set it aside, as the bail had not perfected on the Tuesday. (k) But this position appears now to be overruled. In *Maycock v. Solyman*, (l) it was determined, that if an attachment issue on the *fourth* day, the court will not set it aside without first calling on the defendant to justify bail.

Accepting  
of, or ex-  
cepting to  
bail.

Within  
what time  
bail are to  
justify in  
the C. P.  
after excep-  
tion.

### *Of adding Bail.*

At any time prior to the expiration of the period limited for justifying, if the persons already put in as bail, either from disinclination, inadequacy of property, or other cause, are unable to fulfil their implied engagement, of establishing that they are competent, other bail may be added. In the King's Bench, in actions by bill, this is effected by inserting the names and additions of the new bail in the bail-piece, or in action by original in that court or in the Court of Common Pleas, by entering the particulars in the filazer's book.

When the substitution of bail is intended, and the ordinary period allowed for justifying is not sufficient, further time may be obtained by taking out a summons for

(i) *North v. Evans*, 2 H. Bl. 35.  
(l) 1 N. R. 139.

(k) *Id.*

Accepting  
of, or ex-  
cepting to  
bail.

Of adding.  
bail.

that purpose, which will operate as a stay of proceedings, if it be returnable before the allotted time for justifying the bail has expired. (m)

Immediately after the insertion of new names in the bail-piece, it is desirable that an application should be made to the court for permission to enter an *exoneretur* as to the former bail; for until this course has been adopted, they will continue liable on the recognizance, although they may have been excepted to, and have refused to justify; (n) but it is not essential to the security of the bail, that the motion for this purpose should be made at the earliest opportunity; for bail against whom an exception has been entered, may apply at any time to be relieved, on paying the costs incurred by the party proceeding against them. Such an application has been acceded to, even after two *scire facias* and returns of *nihil*. (o) In the latter case, an *exoneretur* is entered *nunc pro tunc*. (p)

Bail having a direct and immediate interest in the event of the suit, are incapacitated from giving evidence on behalf of their principal; (q) hence, if the defendant intend examining one of the bail as a witness, application should be made to the court for permission to strike his name out of the bail-piece, on undertaking to substitute another in his stead. This motion should be founded upon an affidavit, stating that the party is a material witness, and it may be made at any time during the pro-

(m) *Redford v. Edie*, 6 Taunt. 240.

(n) *Clement v. Tubb*, cited in 4 Burr. 2107.

(o) *Sayer*, 58. 309. 1 Wills, 337. *Toulk v. Burke*, 1 Bl. Rep. 462. *Bramwell v. Farmer*, 1 Taunt. 429.

(p) *Humphry v. Leite*, 4 Burr. 2107.

(q) *Young v. Wood*, Barnes, 69. See *Carter v. Pearce*, 1 T. R. 163. *Young v. Bairner*, 1 Esp. 103. *Piesly v. Von. Esch*, 2 id. 603. *Baker v. Tyrwhitt*, 4 Campb. 27. *Bind v. Bacon*, 5 Taunt. 183.

gress of the cause, (r) notwithstanding the time limited for justifying may have expired.

Accepting  
of, or ex-  
cepting to  
bail in town.

When an exception has been entered against the original bail, it is a fixed and settled rule that the added bail are bound to justify, whether they have been excepted to or not. It is therefore unusual and nugatory to except to the latter. (s) And from this circumstance is derived the practice of including in the notice of justification, the names, residence, and addition of the substituted bail. (t)

Adding bail.

New bail may be described in the notice as added bail, though the original bail have been rejected. (u) Nor is it material that the recognizance should have been entered into antecedent to giving notice of added bail; it will suffice, if the recognizance be taken, and their names recorded on the morning of justification. (x) Where notice of bail had been given on the 10th of November; and on the 12th, that other bail would be added who would justify on the 15th; but on the 14th, the latter notice was countermanded, and notice again given of the original bail; it was holden that the last notice would have been sufficient, if due notice of justification had been given. (y)

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(r) *Young v. Wood*, Barnes, 69. *Whalley v. Terally*, Imp. C. P. 185.

(s) *Gregory v. Gurden*, Barnes, 74.

(t) *Stone v. Stevens*, 3 Anst. 636. See Anon. 2 id. 564, contra.

(u) *Webb v. Matthew*, 1 B. & P. 225.

(x) 1 B. & P. 628. See *Collier v. Godfrey*, 1 H. Bl. 291. *Gregory v. Gurdon*, Barnes, 74.

(y) ——— *v. Marshall*, 1 Marsh, 322. vide post, 309.

## SECTION III.

## OF JUSTIFYING BAIL.

As the design of entering an exception against the bail, is to oblige the parties, to prove upon oath their ability to fulfil the obligation incident to the character of bail, it is necessary that the plaintiff should be informed of the time and place at which their competency is to be established.

Notice of  
justification.

The memorandum by which this information is communicated, is called "A notice of justification."

How en-  
titled.

Whether the bail first put in, or others subsequently added, intend to justify, the notice should be correctly entitled of the court in which the action was brought, and in the name of the cause. A material inaccuracy in either of these particulars, will, in general, render it void; (a) though a mere transposition of the names of the parties will not afford sufficient ground for the rejection of the bail. (b)

Number of  
the bail in  
the notice.

In the King's Bench and Exchequer, notice of justification of three bail is valid; (c) and in *De Tastel v. Kroger*, (d) *McDonald*, Chief Baron said, "he did not know that there was any line drawn with respect to the number of bail; it must depend upon the particular circumstances of each case;" though a different practice obtains in the Common Pleas. (e) And in any of the courts, notice that A., B., and C., or two of them will justify; (f) or a notice,

(a) *Lofft*, 237.

(b) *Anon.* 2 *Chit. Rep.* 86.

(c) *Lofft*, 26. *Forrest*, 158. *Jell v. Douglass*, 1 *Chit. Rep.* 601.

(d) *Wightw.* 110.

(e) *Allen v. Keyt*, 2 *Bl. Rep.* 1122.

(f) *Lofft*, 26.

specifying that one person only will become bail, is irregular. (g)

Of justifying bail.

Bail, how described in notice.

When the original bail are to justify, it has not in practice been usual to describe their addition or place of abode in the notice; and the ordinary mode of proceeding has been merely to state, in general terms, that the bail already put in will justify on a particular day; (h) but from a recent case, it would seem necessary that the christian and surnames should be inserted. (i) It has, indeed, even been said, that the parties' addition, and place of abode should be described. (k) When the names are introduced, extreme care should be taken that the appellation given in a subsequent notice corresponds with the names used in a prior one; and if there be any essential incongruity in this respect, the bail will be rejected. (l)

Thus describing the bail in the notice of justification by the christian name of Thomas instead of John, is bad; (m) and where the party in the notice of bail was named *Lloyd*, and in the affidavit of justification the name was spelled with a single L, the notice was considered to be irregular. (n)

In the Court of Common Pleas an inaccuracy in the description of the bail, in the notice of justification, even where no notice of bail has been previously given, is waived by the plaintiff's entering an exception to them. (o)

(g) *Steward v. Bishop*, Barnes, 60.

(h) *England v. Kerwan*, 1 B. & P. 335. Jeffry's bail, 1 Chit. Rep. 351.

(i) *Taylor v. Halliburton*, 1 Chit. Rep. 351. 494. s. c. n. See forms, Tidd, App. 114. 5th ed. 1 Lees' Dict. 114. Imp. Prac. K. B. 175. Imp. Prac. C. P. 178. 5th ed., in which the names, &c. of the bail are not introduced; but in the Appendix to Mr. Manning's Ex. Prac. 81., the names of the bail are mentioned. (k) Anon. 1 Chit. Rep. 351. n.

(l) *Hamilton's bail*, 1 Chit. Rep. 494. n.

(m) Anon. 1 Chit. Rep. 351. n.

(n) *Williams's bail*, 1 Chit. Rep. 495. Anon. 1 B. Moore, 126. *Wood v. Chadwick*, 2 Taunt. 173.

(o) *Bigg v. Dick*, 1 Taunt. 17, 18. The reason assigned for this rule, is, that the plaintiff might have ascertained the names of the bail, and

Of justify-  
ing bail.

Bail, how  
described  
in notice.

By whom  
the notice  
may be  
given.

When new bail are substituted for those originally put in, they must be described in the notice of justification with the same precision as is required in the original notice of bail. (p) Stating, however, that two were added bail, when in point of fact, only one was added, is not material. (q)

As it is an established rule, that during the progress of a cause, a party cannot change his attorney, without first obtaining leave from the court, it is material that the notice of justification, where an order for that purpose has not been procured, should be given by the same attorney as was originally retained by the defendant. (r) But this rule is inapplicable to the case of prisoners, who, in order to obtain their liberty, are allowed to justify bail by a new attorney, without previously obtaining a rule of court authorizing the change. (s) And where the defendant's attorney refused to instruct counsel to move that the bail might justify, unless he would pay him his costs, the Court of Common Pleas, on the application of the bail, granted a rule for them to appear and justify by their own attorney, to prevent the bail-bond being assigned. (t)

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the place of their residence, when he entered the exception in the filacer's book.

(p) *England v. Kerwan*, 1 B. & P. 335.

(q) *Anon.* 2 Chit. Rep. 86.

(r) *Macpherson v. Rorison*, 1 Doug. 217. *Ray v. Demattos*, 2 W. Bl. 1323. *Hill v. Roe*, 6 Taunt. 532. 2 Marsh. 257. s. c. *Anon.* 1 Chit. Rep. 329. n. semb. same case, 2 id. 76. vide ante, 282.

(s) *Keys v. Tavernier*, 1 Chit. Rep. 291. See *Wheeler v. Rankin*, id. 81. *The King v. the Sheriff of London*, 2 B. & A. 604. 1 Chit. Rep. 329. s. c., and cases in note (a).

(t) *Haggett v. Argent*, 7 Taunt. 47. 2 Marsh. 365. In this case Gibbs, C. J. said, that though the defendant could not change his attorney without leave of the court, but the sheriff and bail might appear by their own attorneys. From this judgment and the case of *Hill v. Roe*, 6 Taunt. 532. 2 Marsh. 257. s. c., it would appear, that it is no ground for an attachment against the sheriff, that bail have been put in by a new attorney.



In the Exchequer, notice of justification must be given in the name of the attorney or clerk in court.(u)

Of justify-  
ing bail.

In the Court of King's Bench, when the bail originally put in and excepted to, intend to justify, the notice should be served upon the plaintiff's attorney one day prior to the time appointed for the justification, as on Tuesday for Wednesday; (x) and when a Sunday intervenes, the notice must be given on Saturday for Monday.

Within what  
time notice  
must be  
given in  
K. B.

Where fresh bail is added, whether the addition be of one or both of the bail, there must be two clear days' prior notice of justification, one inclusive, and the other exclusive, as Thursday for Saturday; and Sunday is not computed a day for that purpose, consequently, notice of added bail, on Saturday for Sunday, is invalid. (y) The rule that two days' notice of added bail must be given, is strictly enforced; for where a notice, good in substance, but defective in point of form, had been given, as on Monday for Tuesday, (by mistake for Wednesday) and on Wednesday a subsequent notice was delivered for Thursday, the bail were rejected.(z) Where, after regular notice of justification, notice of adding bail is substituted, one day's notice is sufficient to countermand the latter and revive the former. (a) If the time limited for the justification of bail expire on a day in term, which happens to be a *dies non juridicus*, the notice, nevertheless, ought to be for that day, although the bail will not justify until the succeeding one. (b)

When bail above are put in, and exception entered in

(u) 9 Price, 148.

(x) Wright v. Ley, H. 15 Geo. 3. K. B. cited 1 Tidd, 283. 7th ed, 2 B. & P. 31. n. a. s. c.

(y) Overton's bail, K. B. cited 1 Tidd, 283. 7th ed. Imp. K. B. 199.

(z) Morgan's bail, 1 Chit. Rep. 308.

(a) ——— v. Marshall, 1 Marsh. 322.

(b) By Master Forster, cited 1 Tidd, 283. 7th ed. Imp. K. B. 173;

Of justify-  
ing bail.

Within what  
time notice  
must be  
given in the  
K. B.

vacation, notice that the bail will justify on the first day of the next term must be given within four days after notice of exception, or the plaintiff will be entitled to an assignment of the bail-bond. (c) But this rule (d) does not render it necessary that the same bail should justify; and therefore, where bail were excepted to in the vacation, and the defendant gave four days' notice of justification for the first day of the succeeding term, but two days before that time, gave notice of added bail; it was holden, that as the four days' notice had been originally given, that the latter bail were entitled to justify. (e)

In the C. P.

In the Court of Common Pleas, as well where the bail originally put in intend to justify, as in the case of added bail, two days' notice of justification must be given, the one exclusive, and the other inclusive; (f) and when there is an intervening Sunday, a notice delivered on Saturday should state that the bail will justify on Tuesday. (g)

With reference to giving notice when the bail are excepted to in vacation, the practice of the Court of Common Pleas differs from the Court of King's Bench; as in the former, notice of justification may be given at any time in the vacation, provided it be delivered two days prior to the first day of the next term. (h)

In the Ex-  
chequer.

In the Court of Exchequer two days' notice of justification must, in all cases, be given. A notice to justify on.

(c) R. E. 5. Geo. 2. *Millson v. King*, 9 East, 434.

(d) R. E. 5 Geo. 2.

(e) *Hone v. Barker*, 1 Chit. Rep. 4. *Woodroffe v. Oldfield*, 1 D. & R. 7. See *Lunn v. Leonard*, 1 M. & S. 366. — *v. Marshall*, 1 Marsh. 322.

(f) *Teale v. Cheshire*, Barnes, 82. *Elton v. Manwaring*, id. 88. *Nation v. Barrett*, 2 B. & P. 30. — *v. Marshall*, 1 Marsh. 322.

(g) *Gregory v. Reeves*, Barnes, 303.

(h) *Fowles v. Grosvenor*, Barnes, 101.

a day in which this court sits in equity is void. (i). Where the bail are excepted to in vacation, the notice of justification must be given within four days after it has been entered. (k)

Of justify-  
ing bail.

In the Ex-  
chequer.

Prior to a late rule of court, (l) there were some minute distinctions (m) as to the payment of costs, when the bail did not attend to justify, according to the first notice; but it is now ordered, "that whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify, without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them may not have been changed; and whether the bail mentioned in any such prior notice, shall not have appeared, or shall have been rejected." In the Common Pleas, although there is no express rule of court, the practice is the same as in the King's Bench. (n)

Of several  
notices of  
justification.

The notice of justification of bail ought, in strictness, to be served personally upon the plaintiff's attorney, or on some clerk or servant in his office. (o). Depositing the notice in the letter box at the attorney's chambers, is unavailable, (p) unless the receipt of it be at a subsequent period, (q) distinctly acknowledged by him; or some au-

Notice, how,  
and upon  
whom,  
served.

(i) Partridge v. Rose, 2 Chit. Rep. 84.

(k) Manning's Exchequer, Prac. 108. cites Millson v. King, 9 East, 434.

(l) 5 B. & A. 559.

(m) Steer v. Smith, 1 Chit. Rep. 44. id. 80. s. c. Mercer v. Sanby, id. 658. — v. Clarke, 2 id. 89. Aldiss v. Burgess, 3 B. & A. 759.

(n) The King v. the Sheriff of Middlesex, 1 Taunt. 57. Holward v. André, 1 B. & P. 32.

(o) Saunders's bail, 1 Chit. Rep. 77. Fowler's bail, id. 78.

(p) Id. And see H. T. 8 Geo. 3.

(q) Saunders's bail, 1 Chit. Rep. 77. Jameson's bail, id. 100. Jones's bail, id. 294.

Of justify-  
ing bail.

Notice, how,  
and upon  
whom,  
served.

thorized clerk. Where, therefore, notice of bail was served in due time, by leaving it at the office of the attorney, who returned it the next day in a letter, stating that he should not accept the notice, because he had taken an assignment of the bail-bond, the service was deemed valid. (r) Suggesting that endeavours had been made, to obtain an admission from the plaintiff's attorney of the notice having been received, is nugatory. (s)

Although, in general, the notice should be delivered to some person actually in the service of the plaintiff's attorney, yet this rule, under peculiar circumstances, has been departed from; as where both the attorney and his clerk were absent from chambers, at the usual office hours, it was determined, that it might be properly served upon a person who described himself as being authorized by the attorney to receive papers during his absence. (t) But some connexion must be shewn to exist between the attorney and the person upon whom the notice has been served. The circumstance of its being delivered to the master of the house in which the attorney has his office, will not, by implication, create a sufficient privity. (u) And it should, in such cases, appear, that the person who delivered the notice, believed the statement of the party upon whom it was served, that he was properly authorized by the plaintiff's attorney to take in papers. (x)

Where repeated attempts have been made to serve the notice at the attorney's chambers, sticking up a copy

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(r) *Bailey v. Davy*, 1 Chit. Rep. 77. See *Arrowsmith Ingle*, 3 Taunt. 234.

(s) *Hall's bail*, 1 Chit. Rep. 79.

(t) *Thompson's bail*, 2 Chit. Rep. 87.

(u) *Freeman's bail*, id. 88.

(x) *Thompson's bail*, id. 87.

in the King's Bench office, and putting another under the attorney's door, has been considered regular. (y) Affixing notice in the King's Bench office is sufficient, if the plaintiff himself be an attorney, and his place of residence unknown. (z) So if the plaintiff sue in person, and the defendant be ignorant of his abode, placing a notice in the prothonotary's office will suffice. (a)

Of justifying bail.

Notice, how, and upon whom, served.

In the Exchequer, all notices must, in general, be given and received in the name of a clerk in court. But in the case of bail, the court, on an objection founded upon the above rule, that the notice was signed by the attorney in the cause, will grant further time to justify. (b)

Anterior to a recent regulation, the notice of justification might have been served at any time before ten o'clock at night in the King's Bench, (c) or nine o'clock at night in the Common Pleas ; (d) but now it is a rule in both courts, (e) " that from and after the last day of Trinity term, 59 Geo. 3. every notice for justifying bail in person shall be served before eleven o'clock, in the forenoon of the day, on which, according to the present practice, such notice ought to be served, except in case of an order of the court for further time, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such order shall be granted ; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served."

At what time to be served.

(y) *Atkinson v. Thompson*, 2 Chit. Rep. 81.

(z) *Anon.* 2 Chit. Rep. 89.

(a) *Ward v. Nethercoate*, 7 Taunt. 145.

(b) *Calvert v. Bowater*, 1 Price, 385.

(c) R. M. 41 Geo. 3. 1 East, 132. *Anon.* 2 Chit. Rep. 88.

(d) *Chessell v. Parkin*, 2 Taunt. 48. *Arrowsmith v. Ingle*, 3 id. 234.

(e) R. T. 59 Geo. 3. K. B. 2 B. & A. 818. 1 Chit. Rep. 756. R. M. 63 Geo. 3. C. P. 1 B. & B. 469. 4 B. Moore, 2.

Of justify-  
ing bail.

At what  
time to be  
served.

Affidavit of  
service of  
notice of  
justification.

An acknowledgment by the plaintiff's attorney, that the notice has been received, without specifying the time, will be a sufficient admission of the validity of the service. (f) A continued notice of bail, where time has not been given by the court, need not be served before three o'clock. (g)

Prior to the bail justifying, an affidavit, properly entitled of the court, and in the cause, should be made by the person who delivered the notice, stating, in explicit language, the manner in which, and the person upon whom, it was served. (h)

A material irregularity in the service of the notice appearing upon the face of the affidavit, or a mistake in entitling the deposition itself, will render the service and affidavit nugatory. Thus, when two notices of justification had been given to the plaintiff's attorney, one of which was of added bail; and in the affidavit of service to which the two notices were annexed, the deponent stated, that he had served another notice, by delivering it to a female servant, at the house of the plaintiff's attorney, without stating which of the two notices it was that he had thus delivered; the affidavit was considered imperfect, as it should have pointed out by a letter, or other distinguishing mark, the notice sworn to have been served. (i) When the notice has been merely deposited in a letter box, or left at the office of the plaintiff's attorney, instead of being served upon an individual in his chambers, the affidavit should contain an allegation, that subsequent to such service, the plaintiff's attorney, or some authorized person, had admitted

(f) *Bailey v. Davy*, 1 Chit. Rep. 77. n. See *Fowler's bail*, id. 78.

(g) *Williams v. Taylor*, 5 B. Moore, 472.

(h) *Hayward's bail*, 1 Chit. Rep. 1.

(i) *Yates's bail*, 1 Chit. Rep. 43. See *Saunders's bail*, id. 77. *Fowler's bail*, id. 78. *Hall's bail*, id. 79.

the receipt of it; (k) though, in one case, where the affidavit stated, that in the absence of the attorney and his clerk, the notice was left with a person, who stated that he was in the habit of receiving papers for the attorney, according to his directions, that an application was again made at the same place on a subsequent day, to inquire if the notice had been received, and the attorney and his clerk were again out of the way, it was deemed sufficient. (l)

Of justifying bail.

Affidavit of service of notice of justification.

Having shewn the proceedings necessary to be taken prior to justifying bail, and the period within which the bail, after exception, must be perfected, it will be proper to state, at what place, and in what manner, the justification is to be conducted.

Where bail must justify.

The justification of bail is either in open court, or at a judge's chambers; the former is the ordinary practice; the latter can only be done by the consent of the plaintiff's attorney. (ll)

In actions in the King's Bench, the bail justify in a court specially appropriated to that purpose, called the bail court. By a rule of Easter term, 28 Geo. 3., it was ordered, that the court should sit in Serjeant's Inn Hall every morning during term, from half past eight o'clock till ten, for the purpose of taking justifications of bail, and hearing motions of course. This order was subsequently repealed, and it was directed that the sittings of the court, in Serjeant's Inn Hall, should be discontinued, and that the business there conducted, should be done in the King's Bench, at Westminster, where one of the judges would sit during term time, every morning, at half past

In K. B.

(k) Saunders's bail, 1 Chit. Rep. 77. Jameson's bail, id. 100, et vide supra.

(l) Thompson's bail, 2 Chit. Rep. 87.

(ll) Where one of the bail have justified at chambers, an order for the other to justify in open court must be obtained. Cohen's bail, M. T. 1823. MS.

Of justify-  
ing bail.

Where bail  
must jus-  
tify.

nine o'clock, for the purpose of taking the justification of bail and discharge of insolvent debtors. The court in which bail justify, is now generally holden before one of the judges, in the Dutchy Chamber, under the provisions of the stat. 57 Geo 3. c. 11., which empowers any one of the judges, when occasion shall require, to sit apart from the rest of the bench, in some convenient place, in or near Westminster Hall.

In the C. P.  
and Exche-  
quer.

In the Common Pleas and Exchequer, there is no distinct or separate court for the justification of bail.

At a judge's  
chambers.

The practice of justifying before a judge at chambers, it has been before stated, can only be adopted when the previous consent of the plaintiff's attorney has been obtained, or in vacation, when the defendant is a prisoner. (m) In *Sayers v. Tolfree*, (mm) where the bail had justified at chambers in vacation without permission, but the plaintiff had not objected to an application for that indulgence, the court considered, that the plaintiff had indirectly sanctioned the proceedings, and that it was equivalent to an express consent.

Mode of  
justifying in  
court.

Where the bail justify in court, in actions by bill in the King's Bench, the judge's clerk, the evening preceding the morning of justification, should be requested to bring the bail-piece into court, and attend and deliver it to the master, or it may be obtained by the defendant's attorney, and given to the master in court. In actions by original, or in the Common Pleas, instead of requesting the judge's clerk to be present, application must be made to the filacer, who will attend with the bail-piece, or book, in which the names have been entered.

In cham-  
bers.

As the bail-piece, in actions by bill, remains at the judge's chambers, when that course is adopted, the bail

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(m) 5 Geo. 2. Reg. K. B. Anon. 6 Mod. 25. *Hawkins v. Plomer*, 2 Bl. Rep. 1064. *Sayers v. Tolfree*, 1 Price, 2. (mm) 1 Price, 2.



should attend there, when the judge's clerk will administer the oath by which they swear to their sufficiency, and will take the recognizance. In actions by original, orders must be given to the filacer to attend at the judge's, with his book, and the bail justify as in actions by bill.

Of justifying bail.

Mode of justifying.

Bail either justify in person, or by affidavit: in person, when put in in town; by affidavit, when put in in the country. The mode of proceeding when the latter is adopted, will be considered in the next chapter.

On the morning of justification the bail should be either actually in court or attending in its vicinity, at the hour appointed by the court for their attendance.

At what hour bail must justify in court.

In the King's Bench, it is ordered by a rule of Easter term, 28 Geo. 3., that the bail shall attend before half past nine; and by a subsequent rule, (n) it is directed, that no bail shall be permitted to justify after ten o'clock: and soon after the establishment of the bail-court, Mr. Justice Bayley directed it to be understood, "that in future, bail intended for justification, must be in Westminster Hall by half past nine o'clock in the morning; and that if the bail were not ready, and the papers delivered to counsel by ten o'clock, no bail could be taken after that hour." (o)

In K. B.

In the Court of Common Pleas, it is a rule, "that bail shall justify at the sitting of the court only, and at no other time, except on the last day of term, when bail, who may have been prevented from attending at the sitting of the court, shall be permitted to justify at the rising of the court." (p)

In the C. P.

In the Court of Exchequer, (q) it is the fixed and set-

In Exchequer.

(n) T. T. 35 Geo. 3. In Lofft, 88, it is stated, that the bail not present at the sitting of the court, must wait until the rising.

(o) 1 Chit. Rep. 1, 2. n.

(p) R. E. 51 Geo. 3. C. P. 3 Taunt, 569.

(q) 2 Price, 327. See 3 id. 35.

Of justify-  
ing bail.

ted practice, (r) though not promulgated by a formal rule or order, that the justification of bail must be taken at the sitting of the court, or before the commencement of the ordinary business of the day.

On last day  
of term.

But the rule that bail shall attend at the sitting of the court, when the justification is to take place on the last day of term, has been departed from; and in all the courts, bail are upon that day permitted to justify at the rising of the court. (s)

At what  
time bail  
should be  
opposed.

The names of the bail are called on in regular succession; and if they be not opposed, are allowed to justify as a matter of course, by each swearing that he is a householder or freeholder, and worth double the sum sworn to, or 1000*l.* beyond that sum, if it exceed 1000*l.*, (t) after all his debts are paid.

If the bail be foreigners, they may be sworn and examined through the medium of an interpreter. (u)

Any objection to the bail should be advanced immediately after they have been sworn, and before they have justified. (x) The omission to oppose the bail in proper time having originated in the mistake of counsel instructed to object to them, will not afford sufficient ground to permit the bail to be subsequently examined, although the inadvertence is attempted to be aided immediately after the justification has taken place, and before they

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(r) 4 Price, 155. In re Tomkinson, 2 Chit. Rep. 94. The court said, that though the *dictum* in 2 Price, 327., relating to the justification of bail at the sitting of the court and before the other ordinary business, was not promulgated by the court as a rule or order of the court, but only as an intimation of what they intended to make a rule; and though that intention was never carried into effect, yet, that the rule seemed so reasonable, that they should refuse the motion.

(s) See 3 Taunt. 569. 2 Price, 327. 3 Price, 35.

(t) R. M. 51 Geo. 3. K. B. C. P. and Exchequer.

(u) Glead v. Mackay, 2 Bl. Rep. 956.

(x) Hawkins v. Wilson, 4 Taunt. 660.

have departed from the court. (y) But this rule does not extend to cases where the bail have justified by mistake, without any default of counsel. (z)

Of justifying bail.

The bail may be opposed either by personal examination or by affidavit, or by both. When the former method is adopted, the counsel, by a rigorous examination, should endeavour to elicit from the bail an acknowledgment of their real situation. When the latter mode is pursued, an affidavit should be produced, disclosing such facts as will convince the court that there has been some irregularity or defect in the proceedings, or that the bail are incapable of fulfilling their engagement.

Mode of conducting opposition.

The affidavit must be put in and read before the bail are examined, as it is a settled rule, that an affidavit, impugning their sufficiency, cannot be read, or the substance stated to the court, after any questions have been asked the bail. (a) It must set forth the particular objection intended to be relied on with certainty and precision; merely suggesting matters of report and general opinion, without alleging any particular fact, from which a distinct inference of incompetency can be collected, will be of no avail. (b)

By affidavit.

If the same persons are bail in two actions, they must be opposed on each separately. (bb)

In examining the bail, considerable latitude is permitted. Every question may be put to them, which will at all conduce towards establishing or negating their competency; they may consequently be interrogated respecting the nature and amount of their property, until

By examination.

(y) *Butler's bail*, 1 Chit. Rep. 83. The rule is established, that opposition comes too late after the bail have justified; and it is not in my power to admit you to examine the bail. Per Bayley, J.

(z) *Addison v. Foster*, 2 Chit. Rep. 98.

(a) *Anon.* 1 Chit. Rep. 373. n. *Imp. K. B.* 195. n.

(b) *Sanderson's bail*, 1 Chit. Rep. 676. See *Williams v. Hunt*, *id.* 321.

(bb) *Anon.* 2 Chit. Rep. 94.

Of justifying bail.

Mode of conducting opposition.

they have satisfactorily shewn that they are possessed of a sum equal to the payment of the amount for which they have rendered themselves answerable : but no questions which are foreign or irrelevant to the immediate object of the inquiry, can be put ; (c) or which would unnecessarily expose the circumstances of the bail, or lead to the useless developement of the pecuniary situation of other persons. Where one of the bail was asked, whether he had not stood in the pillory for perjury ; (d) upon an objection being taken to the question, as tending to criminate him, the court said, that there was no impropriety in the question, as the answer could not subject him to punishment ; (e) and the bail, admitting the suggestion to be true, was immediately rejected.

(c) Dobson's bail, H. T. K. B. 1823. MS.

(d) *The King v. Edwards*, 4 T. R. 440.

(e) This reason, it is with much deference conceived, is far from being satisfactory; for assuming that the examination of bail is to be conducted in a manner at all analagous with that observed in the examination of witnesses, the question could not have been put, or if it had, it need not have been answered. The rule of evidence is, that a witness is not compellable to declare his own infamy, nor confess what would directly degrade his character. In *Cook's case*, 4 St. Tr. 748. s. c. 3 Salk. 338., C. J. Treby said, " Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer ; for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy ; and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty, his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So, persons have been excused from answering, whether they have been committed to bridewell as pilferers or vagrants, &c. Yet, to be suspected, is only a misfortune, and shame no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable." In *Rex v. Lewis*, 4 Esp. 225. a witness, in cross-examination, was asked, if he had not been in the House of Correction. Lord Ellenborough interfered and said, that that question could not be asked ; a witness was not bound to answer any question, the object of which was to degrade or render him infamous. See *Sir John Friend's case*, 4 St. Tr. 559. *Layer's case*, 6 id. 259. 5 M. & S. 244. 4 Esp. 242. It may perhaps be urged, that there is, in this respect, a distinction between bail and witnesses ; the former come forward voluntarily to accomplish a private end, and purposely subject them-

When the same bail are opposed in two different actions they must be opposed in each separately. (*f*)

Of justifying bail.

If the bail, on their cross-examination, either admit that they have forsworn themselves, or from gross prevarication, render it apparent, that what they before stated was untrue, they may be committed by the judge for a contempt of court, and are subject to an indictment for perjury. (*h*) In Royson's case, (*i*) where the bail, on being examined, acknowledged that he had forsworn himself, he was immediately committed to prison, and adjudged to stand in the pillory, without any other evidence against him than his own confession. But the courts will not set aside the allowance of bail on the ground that one of the parties has sworn to a false account of his property, if it do not appear that the defendant or his attorney was privy to the misconduct of the bail. (*k*)

Prevarication.

The offence of personating bail has been provided against by the statutes 21 Jac. 1. c. 26. s. 2., and 4 and 5 W. & M. c. 4. s. 4. The first of these acts makes it felony without benefit of clergy, "to acknowledge, or procure to be acknowledged, a recognizance of bail, in the name or names of any person or persons not privy or consenting to the same." But this act extended only to bail taken in the courts themselves; (*l*) so that, if the bail acknowledged in another name was not filed, the offence

Personating bail.

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selves to examination, to prove to the court, that they are competent to fulfil the responsibility attached to the character they have assumed; the latter have a higher duty to fulfil, a duty which they owe to the public and to the administration of justice, and ought, on that account, to be protected.

(*f*) Anon. 2 Chit. Rep. 94.

(*h*) See form of indictment, 6 Wentw. 423, 424. 2 Chit. Crim. 332. Curtis v. Smith, 1 Chit. Rep. 116.

(*i*) Cro. Car. 146.

(*k*) A'Becket v. ——— 5 Taunt. 776.

(*l*) 3 Bla. Com. 128.

Of justify-  
ing bail.

Personating  
bail.

was a misdemeanour only ; and therefore, the 4 and 5 W. & M., which authorizes bail to be taken by commissioners in the country, or by any judge on his circuit, makes it a single felony for any one, before a person empowered by virtue of that act, to take bail to represent or personate any other person, whereby the person so represented and personated may be liable to the payment of any sum of money for debt or damages, to be recovered in the same suit or action, wherein such person is represented and personated, as if he had really acknowledged or entered into the same. And the 27 Geo. 3. c. 43. extends the same provisions to the taking special bail in Chester. Still, however, the mere personating bail before a judge in chambers, which is not filed of record, appears to be a misdemeanour only. (m)

If bail be put in under *feigned* names, there being no such person to be defrauded, it is no felony, though the defendant may be sentenced to the pillory, or such higher punishment as the court may think proper to inflict. (n)

Grounds of  
objections to  
the bail.

Having considered the mode of objecting to the competency of the bail, the manner in which they are to be examined, and the consequences of prevarication, the next object of inquiry is, what are the specific and definite grounds upon which the justification may be successfully opposed. But as the qualification to be possessed by the bail, and the proper mode of conducting the proceedings, have been previously examined, it may here suffice to subjoin an analytical table of the grounds on which the opposition may be made, with references annexed to the other parts of

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(m) 1 Hale, 696. *Timberlye's case*, 2 Sid. 90.

(n) Anon. 1 Stra. 384.

the work, in which they have been investigated and discussed.

Of justifying bail.

## I. INCOMPETENCY OF THE BAIL.

1st, On account of personal disqualification :—

*The King*, p. 269.

*The Queen, or members of the Royal Family*, p. 269.

*Servants of the King*, p. 269.

*A peer of England*, p. 269.

———— *Ireland*, p. 269.

———— *Scotland*, p. 269.

*A member of the House Commons*, p. 269.

*An ambassador*, p. 269.

*An ambassador's servant*, p. 269.

*An officer of a court of justice exempt from ordinary process*, p. 269.

*An attorney*, p. 269, 270.

*An attorney's clerk*, p. 271.

*A gaoler*, p. 271.

*A summoning officer*, p. 271.

*A bailiff, or other person concerned in the execution of process*, p. 271.

*A feme covert*, p. 272.

*An infant*, p. 272.

*A person actually resident in the King's Palace, or the verge thereof*, p. 269.

*A person liable on the same instrument with the defendant*, p. 281.

*A person not a freeholder*, p. 268.

*A person not a housekeeper*, p. 273.

*A person before rejected*, p. 279.

*A person unacquainted with the defendant*, p. 281.

*A person convicted of some infamous crime*, p. 272.

Of justify-  
ing bail.

Incompe-  
tency of the  
bail.

2dly, On account of insufficiency of property.

*A person not worth double the sum sworn to, or one thousand pounds beyond that sum, if it exceed one thousand pounds, p. 275, 279.*

*A bankrupt who has not obtained his certificate, p. 278.*

*A bankrupt, who, under a second commission, has not paid 15s. in the pound, p. 278.*

*A person discharged under the Insolvent Act, p. 279.*

## II. ON ACCOUNT OF IRREGULARITY IN THE PROCEEDINGS.

1st, In the bail-piece, p. 287.

*For not being entitled in the cause, p. 287, 288.*

*For a misnomer in the name of the parties, p. 288.*

2dly, In the notice of bail, p. 291.

*For not being correctly entitled, p. 293.*

*For not accurately stating the names of the bail, p. 294.*

*Or the place of their abode, p. 294.*

*Or their degree or addition, p. 296.*

3dly, In the notice of justification, p. 306.

*For not being properly entitled, p. 306.*

*For not stating the christian and surnames of the bail, p. 307.*

4thly, In the service of the notice of justification, p. 311.

*In having given two or more notices of justification, without having paid the costs incurred by the prior ones, p. 311.*

Time to  
amend  
errors.

Although the different topics immediately connected with the preceding analysis, have been included in prior parts of the work, it will be proper, in this place, to enumerate in what cases, at the time of the justification of the bail, time will be granted to amend an inaccuracy in any of the necessary written documents, or to give the defendant an opportunity to produce new bail, in the



event of the original bail being incapable of establishing their competency, or omitting altogether to attend at the hour appointed for the justification.

Of justify-  
ing bail.

Time to  
amend  
errors.

It may be premised as a general rule, that one judge will not interfere with the allowance of time granted by another judge. (o)

As it would be inconvenient and unjust that a mere clerical error in any of the necessary documents, should preclude the defendant from perfecting bail, the time for justifying will, in general, be enlarged, to enable the defendant to amend it. Hence, where the bail-piece was not entitled of the court, or in the cause, the indulgence of a week's time was granted; (p) and even a misnomer in the bail-piece may be rectified, if the bail have been correctly described in the notice. (q) In *Calvert v. Bowater*, (r) it was objected, that the action was brought against the defendant, at the suit of joint plaintiffs, but that the bail-piece was only entitled in the name of one: the court permitted them to justify, remarking, that if there was no such cause as that mentioned in the bail-piece, the justification would be nugatory.

When al-  
lowed.

In the bail-  
piece.

When no grounds appear for suspecting that an intended misdescription has been introduced, or that there has been an omission in the notice of bail, purposely to mislead the plaintiff, and no affidavit is adduced, stating that his inquiries have been rendered useless, in consequence of such inaccuracy; a defect in the notice of bail, in not being properly entitled, or in not setting forth, with

In the no-  
tice of bail.

(o) *Tomlinson v. Harvey*, 2 Chit. Rep. 83.

(p) *Hall's bail*, 1 Chit. Rep. 79. *Simmons v. Morgan*, id. 10. *Webster's bail*, id. 10. See *Hill v. Roe*, 6 Taunt. 532. 2 Marsh. 257. s. c. See *Anon.* 1 B. Moore, 126.

(q) *Anderson v. Noah*, 1 B. & P. 31.

(r) 1 Price, 385.

Of justify-  
ing bail.

Time to  
amend  
errors.

In the no-  
tice of justi-  
fication.

In the  
affidavit of  
service  
of the  
notice of  
justification.

truth and certainty, the names, places of abode, and additions of the bail, will not afford a tenable ground of opposition; and when such objections have been taken, time has been granted to enable the defendant to correct the mistake. (s)

Time will also be allowed to amend a defect in the notice of justification. Thus, where one of the bail was described by the christian name of Thomas, instead of John, the court allowed the other, who had been correctly designated, to justify; and gave time for the wrong name to be altered, and granted permission for the bail misdescribed to justify at a future day. (t) And where the notice omitted the names of the bail, it being sworn to be a clerical mistake, and no affidavit being produced that it had been done for the purpose of delay, time was given to serve a fresh notice. (u)

Although an irregularity in serving the notice of justification would afford a sufficient ground for the rejection of the bail, yet the courts will, in general, allow an extension of time to rectify the mistake, on the terms of putting the plaintiff in the same situation as he would have been in, if the error had not been committed. (x) These indulgences, where the bail are not opposed, and the inaccuracy is merely of a clerical description, may be obtained as a matter of course; as where, in the affidavit of

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(s) Anon. 1 Chit. Rep. 292. Anon. id. 351. n. Carrington's bail, id. 495. id. n. Atkinson's bail, 2 id. 86. See *Tanner v. Nash*, 1 Price, 400. In *Rennell v. Atkins*, 2 Chit. Rep. 83, it is reported, that Dampier, J. refused to allow time to amend notice of bail, observing, that any indulgence of this sort, would only increase the number of mistakes. And Mr. Chitty in a note says, that it is now the practice not to grant time in these cases, unless an affidavit of a defence on the merits be produced.

(t) Anon. 1 Chit. Rep. 351. n.

(u) Jeffry's bail, 1 Chit. Rep. 351.

(x) Hayward's bail, 1 Chit. Rep. 1.

service, the defendant's name was erroneously spelled Heward for Hayward. (y)

Of justify-  
ing bail.

An affidavit of the service of notice of justification, in which the deponent was described by mistake as agent for the plaintiff, instead of the defendant, was allowed to pass, on the condition, that before the rule for allowance was drawn up, a new and corrected affidavit should be filed. (z)

In the  
affidavit of  
service  
of the  
notice of  
justification.

Time may be obtained to add and perfect other bail, where those already put in are incapable of justifying; but a material distinction is to be observed between where the cause, creating the incapacity, is of a personal nature, existing previous to, or at the time of their being put in, and where the cause, creating the incapacity, has arisen after that event. In the former case, as it is considered that their incompetency must have been known to the defendant, no indulgence is allowed. Thus, if the bail be an attorney, (a) or an uncertificated bankrupt, (b) an insolvent debtor, (c) or a person notoriously not a housekeeper at the time the notice of bail was delivered, (d) time will not be granted. But where the cause creating the disqualification happens posterior to the bail being put in, as subsequent bankruptcy, (e) or insolvency, (f) or by their having discontinued house-keeping, (g) an extension of time will be granted to enable the defendant to obtain and justify other bail.

Of granting  
time where  
the bail are  
unable to  
justify.

(y) 1 Chit. Rep. 1. See Yate's bail, 1 Chit. Rep. 43.

(z) Anon. 1 Chit. Rep. 496. n.

(a) George v. Barnsley, 1 Chit. Rep. 8.

(b) Rawlin's bail, 1 Chit. Rep. 3. In this case the court refused to grant time, not because the party was an uncertificated bankrupt, but from the circumstance of his having admitted, that he had been arrested several times since he had obtained his certificate.

(c) See ante, p. 279.

(d) Hunt v. Haynes, 1 Chit. Rep. 7. Colman v. Roberts, id. 88. Gould v. Berry, id. 143.

(e) Anon. 1 Chit. Rep. 11.

(f) Dixon v. Clarke, id. 8. See Ayton's bail, id. 4. (g) Anon. id. 6.

Of justifying bail.

Of granting time where the bail are unable to justify.

Further time granted to the plaintiff to make inquiries, &c.

So where, from the equivocal nature of the party's occupation of a part of premises, it might be fairly questioned whether he was strictly a housekeeper or not, time will be given; *(h)* or where the bail are precluded by accidental circumstances, from obtaining immediate possession of the house, which would have conferred on them the qualification of being housekeepers. *(i)* When it is doubtful whether the bail is or is not the responsible tenant or occupier of the house, an affidavit, repelling any charge of an intention to mislead, should be adduced. *(k)*

In many instances, the plaintiff has obtained further time to inquire into the character and circumstances of the bail; as where one of them had deceived the plaintiff's attorney, and prevented him from making inquiries, by representing that he did not intend to justify, but afterwards attended for that purpose; the court, without hesitation, granted him time to ascertain their sufficiency. *(l)* A similar indulgence will be granted, where the bail, on their examination, give indirect and evasive answers, without the prevarication being sufficiently palpable to warrant their absolute rejection, *(m)* or where the competency of the bail may appear suspicious, from other causes, which are not directly negatived. *(n)*

Whenever the plaintiff obtains further time to investigate the situation and pecuniary circumstance of the bail, a corresponding indulgence is usually granted to the defendant, to enable him to put in other bail. *(o)*

*(h)* Walker's bail, 1 Chit. Rep. 316.

*(i)* Bold's bail, 1 Chit. Rep. 288.

*(k)* Colman v. Roberts, 1 Chit. Rep. 88.

*(l)* Vanderncoolen's bail, 1 Chit. Rep. 289.

*(m)* Anon. 1 Chit. Rep. 354. n.

*(n)* Spurden v. Mahoney, 1 Chit. Rep. 309. n.

*(o)* Anon. 1 Chit. Rep. 354. n. See Green v. Hartley, id. 354.

If the bail, either designedly, or from unforeseen or accidental causes, omit, or are unable to attend at the period appointed for their justification, and no further time be obtained for that purpose, the bail are considered to be out of court; (*p*) but in general, when these impediments arise, the courts, at the suggestion of counsel, will grant further time, either to justify the same bail, or to add and justify others. In the King's Bench (*q*) it is a rule, that "when a motion is made for further time to justify bail, it must be supported by an affidavit of the special facts, alleged in excuse of the bail not attending at the time mentioned in the notice of justification; or in case further time be given, upon suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless at the given time such an affidavit be produced as before described."

Of justifying bail.

Further time granted when the bail have omitted to attend.

In this affidavit it should be expressly averred, that the party not attending, had promised to become bail; and the belief of the deponent, that if he had been present, he would have been able to establish his competency, should be stated. (*r*) It does not, however, appear essentially necessary, that the affidavit should disclose the cause which prevented the bail from giving their attendance; although, where such an explanation is omitted, the judge presiding in the bail court, will, perhaps, postpone granting an extension of time, until an affidavit, specifying the cause of their non-appearance, is laid before him. (*s*)

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(*p*) Crompt. Prac. 3d ed. 64. *Hardwick v. Bluck*, 7 T. R. 297. See *Wood v. Sutton*, 7 Mod. 50. 1 N. R. 138. n. *Seaver v. Spraggon*, 2 id. 85.

(*q*) R. M. 36 Geo. 3. K. B.

(*r*) West's bail, 1 Chit. Rep. 292. *Hamilton v. Dainsford*, 2 id. 82. 1 Chit. Rep. 2 n. (*b*)

(*s*) Tidd, 297. 7th ed.

Of justify-  
ing bail.

Further  
time granted  
when the  
bail have  
omitted to  
attend.

Conse-  
quences of  
an effectual  
opposition.

When the court have indulged the defendant, by enlarging the time for a particular day to add and justify bail, and the party does not attend on that day, he cannot justify on a subsequent one, without a fresh rule for that purpose.<sup>(t)</sup> But in the Common Pleas, where the bail were put in in due time, but did not attend to justify, pursuant to notice, and the defendant's attorney delivered a new notice for the succeeding day, the court granted them permission to justify, on the condition of paying the costs incurred by the first attendance.<sup>(u)</sup>

As soon as the bail have been rejected, and further time has not been obtained, the plaintiff is at liberty to take an assignment of the bail-bond, or proceed against the sheriff, at his election.

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## SECTION IV.

### ALLOWANCE OF BAIL.

Of the rule  
of allowance.

**IMMEDIATELY** after the bail have established their competency, and received the assent of the court, it is requisite that a rule or order, confirmatory of the bail having been allowed, should be drawn up, with the clerk of the rules, in the King's Bench, or secondary in the Common Pleas, and a copy served upon the opposite party. This practice has been adopted, in order to apprise the plaintiff of the bail having perfected; and it may be assumed that the defendant intends to waive the benefit of the justification, when formal notice has

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<sup>(t)</sup> Carter's bail, 1 Chit. Rep. 42.

<sup>(u)</sup> M'Cormick v. Foulges, M. 33 G. 3. Imp. C. P. 124.

not been given. (x) As a stamp duty of 2s. 6d. is imposed upon every rule, (y) dispensing with the rule of allowance would be also sanctioning a fraud upon the revenue. (z) Hence, until notice of the allowance has been served, the justification may be considered a nullity, (a) even although the plaintiff's attorney may have been present, and unsuccessfully opposed the justification, (b) or has been informed, through other means, that the bail have perfected; and whether the bail justify in open court, or at chambers by consent, the rule for the allowance must be duly served. (c)

Allowance  
of bail.

Of the rule  
of allowance.

The rule ought regularly to be entitled of a day in the term in which the process is returnable, and before the time for putting in bail has expired. The production of this rule, in an action against the sheriff for an escape, is conclusive evidence that the defendant has satisfied the exigency of the writ, although bail may not have been put in until after the commencement of the action, provided it be entitled of the term in which the writ

Of what  
term en-  
titled.

(x) *Holland v. White*, 2 B. & P. 342.

(y) 55 G. 8. c. 184. Sched. part 2.

(z) *The King v. the Sheriff of Middlesex*, 4 T. R. 493. *Booth v. Preston*, cited id. 494.

(a) *Holland v. White*, 2 B. & P. 341. *The King v. the Sheriff of Middlesex*, 4 T. R. 493. *Brook v. Preston*, cited id. 494.

(b) *The King v. the Sheriff of Middlesex*, 4 T. R. 493. *Booth v. Preston*, cited id. 494. *The King v. the Sheriff of Middlesex*, 2 Chit. Rep. 99. In the case last cited, bail were opposed by counsel on the day appointed for the justification, in the presence of the plaintiff's attorney, and justified themselves in open court. The defendant's attorney having obtained the rule for allowance, went to the chambers of the plaintiff's attorney, at a quarter past nine o'clock the same evening, for the purpose of serving it, but finding the office shut, he went away without leaving it in the letter-box. Next day, at half past twelve o'clock, he called and left it at the chambers of the plaintiff's attorney. At eleven o'clock in the same day the sheriff was attached for not bringing in the body. The defendant moved to set aside the attachment for irregularity, but the court said it was the duty of the defendant's attorney to have served the rule for the allowance of bail, on the evening of the day when the rule was granted.

(c) *Bignold v. Lee*, 1 B. & C. 285. 2 D. & R. 496. s. c.

Allowance  
of bail.

Of what  
term en-  
titled.

Rule, how  
served.

Effect of the  
rule, and  
when set  
aside.

in the original action was returnable ; (e) but a rule, entitled after the term in which the writ was returnable, is not a sufficient answer to an action brought against the sheriff before it was put in. (f)

In general, a copy of the rule should be served on the plaintiff's attorney, or on the plaintiff himself, if he has proceeded without the intervention of an attorney; though, where the plaintiff's residence was unknown to the defendant, and his servant refused to disclose it, the Court of Common Pleas ordered, that affixing a copy of the rule of allowance, and of the order then made, in the prothonotary's office, should be deemed good service. (g)

The rule for the allowance of bail, is conclusive evidence, while it remains in force, that the bail have been properly and regularly put in. (h) Yet, neither obtaining the rule, nor serving a copy of that document, will preclude the plaintiff from setting aside the justification, on an affidavit, disclosing gross fraud and imposition on the part of the bail. (i) Hence, a rule of allowance has been discharged with costs, on an affidavit that the bail had perjured himself on his justification, in swearing that an action in which he had before been bail, had been compromised : (k) or it may be set aside, on the ground

(e) *Murray v. Durand*, 1 Esp. 87. *Pariente v. Plumbtree*, 2 B. & P. 35. *Allingham v. Flower*, id. 246. *Jones v. Eames*, 3 Anstr. 675. *Turner v. Carey*, 7 East, 607. *How v. Lacy*, 1 Taunt. 119.

(f) *Moses v. Norris*, 4 M. & S. 397.

(g) *Ward v. Nethercoate*, 7 Taunt. 145.

(h) *Pariente v. Plumbtree*, 2 B. & P. 35. *Murray v. Durard*, 1 Esq. 87.

(i) *Gould v. Berry*, 1 Chit. Rep. 143. Where an application to set aside an attachment, was in reality made on behalf of the sheriff's officer, who was the only person interested in setting it aside; and it appeared that no bail-bond had been taken, the court discharged the rule with costs. *Rex v. the Sheriff of London*, 2 B. & A. 354., and s. c. 1 Chit. 68.

(k) *Brown v. Gillies*, 1 Chit. Rep. 373. See also id. n. (a)



that the bail have been subsequently rejected in other causes. (l)

Allowance  
of bail.

When it can be shewn that the defendant's attorney is privy to the misconduct of the bail, the Court of King's Bench will make him personally liable to the costs of the application; (m) but in the Common Pleas, if bail have sworn to a false account of their property, without the privity of the defendant or his attorney, it is reported to have been determined that the plaintiff has no other remedy than by indictment for perjury. (n)

Effect of the  
rule, and  
when set  
aside.

The rule for the allowance of the bail will be set aside, where they have been put in after the expiration of the limited time, with a view of defeating an action brought against the sheriff for an escape; (o) but if the defendant has been rendered on the day the rule to bring in the body expired, the court will not set aside the allowance of bail, on the ground of an action having been previously commenced against the sheriff for an escape, though no bail-bond may have been taken, nor bail above put in within the proper time after the return of the writ. (p)

(l) Anon. 1 Chit. Rep. 144. n. (b) Waterhouse's bail, id. 307. Anon. id. n. (a)

(m) Gould v. Berry, 1 Chit. Rep. 144.

(n) A'Becket v. ——— 5 Taunt. 776. See Anon. 1 Chit. Rep. 307. note (a), in which it is reported, that where bail had justified in several actions, without opposition, but was afterwards opposed and rejected, Mr. Justice Bailey said, that the former justification, without opposition, must be set aside; and that it was the usual practice in the Common Pleas, and ought always to be so.

(o) How v. Lacy, 1 Taunt. 119. Bosanquet v. Simpson, E. 42 G. 3. K. B. cited 1 Tidd, 259. Moses v. Norris, 4 M. & S. 397. See Austen v. Fenton, 1 Taunt. 23. Leigh v. Bertles, 6 Taunt. 167. 1 Marsh. 520. s. c. Fuller v. Prest, 7 T. R. 109. Rex v. Sheriff of Surrey, id. 239. Webb v. Matthew, 1 B. & P. 225.

(p) Morley v. Cole, 1 Price, 103.

SECTION V.

OF FILING THE BAIL-PIECE.

In the King's Bench and Exchequer, the bail-piece should be filed with the master, during the term in which the bail have been allowed; (q) and by a rule in the former court, "every bail taken before, or upon the continuance-day, (r) is a bail, and to be filed of the preceding term; and every bail taken after the continuance-day, is a bail, and to be filed of the subsequent term, and not otherwise; but where new bail are added to the other bail, taken on or before the continuance-day, in such case the new bail shall be taken and filed, as of that term in which the bail was first put in." (s) But, from the case of *Brandon v. Henry*, (t) it appears, that although bail added and justified in vacation are filed, as of the preceding term, yet bail acknowledged and justified in a subsequent term, are not entered as of the preceding term, even when substituted for other bail put in of the preceding term.

In the Common Pleas, as the recognizance is entered in the filacer's book, the law relative to filing the bail-piece is inapplicable to proceedings in that court.

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(q) R. H. 1680. Reg. R. B.

(r) This is a day certain, usually eight or ten days after every term appointed by the master, on or before which entries, &c. made by the officers of the court, may be made as of the preceding term. See R. E. 11 W. 3. *Unwin v. Kirchoffe*, 1 Stra. 1215. *Pearson v. Rawlings*, 1 East, 409.

(s) R. E. 5 Geo. 2. 1 Salk. 100.

(t) 3 B. & A. 515.

allowance  
of bail.

Of what  
term en-  
titled.

Rule, be  
served.

## CHAPTER IX.

OF PUTTING IN AND JUSTIFYING BAIL IN THE COUNTRY  
AND IN VACATION.

## SECTION I.

## BEFORE WHOM PUT IN.

ACCORDING to the rules of the common law, bail could only be put in in term time before a judge in town ; but this practice being found productive of great expense and inconvenience to the suitors, the legislature enacted, (a) that after the first day of June, 1803, “ if any defendant should be taken, detained, or charged in custody, at the suit of any person or persons upon mesne process issuing out of any of his Majesty’s courts of record, at Westminster or Dublin, and should be imprisoned or detained thereon, after the return of such process, it should, and might be lawful, for such defendant, in vacation time only, and upon due notice thereof given to the attorney for the plaintiff or plaintiffs in such process, to put in and justify bail before any one of the justices or barons of the court, out of which such process shall have issued, who may, if he shall think fit, thereupon order a rule to issue for the allowance of such bail ; and may further order such defendant to be discharged out of custody, by writ of *supersedeas* or otherwise, according to the practice of such court.” In vacation.

The statute 4 and 5. W. & M. c. 4. s. 1., enacts that “ the chief and other justices of the King’s Bench, or any two of them, whereof the chief justice shall be one ; the chief and other justices of the Common Pleas, or any In the  
country.

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(a) 43 Geo. 3. c. 46. s. 6.

Before  
whom put  
in, in the  
country.

Before a  
commission.

two of them, whereof the chief justice shall be one; and the chief or other barons of the Exchequer, or any two of them, whereof the chief baron to be one; shall, by commission, under the seals of the respective courts, empower any person, other than attorneys and solicitors in England, Wales, and Berwick, to take and receive all recognizances of bails, in any action depending in any of such courts, in such form, and by such recognizance or bail-piece, as such justices and barons have used to take the same; which recognizance and bail-piece so taken, shall be transmitted to some one of the justices or barons of the court, where the action shall be depending, and which, on affidavit made of the due taking thereof, by some person who was present, such justice or baron shall receive, on payment of the usual fees to the said judges, clerks, and other officers of the courts; and which recognizance or bail-piece shall be of like effect, as if the same were taken *de bene esse*, before any such justices and barons; and for the taking of which, the person so empowered shall be entitled to 2s."

The second section provides, that "such justices and barons shall make such rules, &c. for justifying of such bails, and making the same absolute as they think meet, so as the cognizors be not compelled to appear in person in any of such courts, to justify themselves; but the same may be determined, by affidavit duly taken before such commissioners, who shall take the same, and also examine the sureties on oath; touching the value of their estates, unless such cognizors do live within London or Westminster, or ten miles thereof."

Before a  
judge.

And by the third section of the same act, any judge, on his circuit, shall and may take and receive all and every such recognizance and recognizances of bails, as any persons shall be willing and desirous to make and ac-

knowledge before him; which, being transmitted in like manner, shall, without oath, be received in manner as aforesaid, upon payment of the usual fees.

Before  
whom put  
in, in the  
country.

• One of the bail may be taken by affidavit before a commissioner in the country, and another before a commissioner in town. (aa)

Fees of  
commission-  
ers.

A commissioner appointed under this act, is not limited by the strict letter, to accept no more than 2s. for taking bail, if he has been put to expense by travelling, or has taken extraordinary trouble at the instance of the parties to effect the taking of the recognizance, or where there are other facts in the case, which afford reasonable ground for an additional charge; and where, under such circumstances, more had been voluntarily paid to him by the bail, a rule to shew cause why he should not refund the *extra* money, was discharged with costs. (b)

## SECTION II.

### WITHIN WHAT TIME, AND IN WHAT MANNER PUT IN, IN THE COUNTRY.

It has already been stated, that when an arrest is made in any other city or county than that of London or Middlesex, that bail in the King's Bench must be put in within six days after the return of process, if the action be commenced by bill, or the *quarto die post*, if it be commenced by original; and that, in the Common Pleas, on process returnable the first return of the term, the bail must be put in in any other city or county than London or Middlesex, within eight days after the appearance-day,

Within  
what time.

(aa) *Mandorfe's bail*, 2 Chit. Rep. 90.

(b) *Watson v. Edmunds*, 5 Price, 2. In cases where such an application can be sustained, it must be made by the parties who actually paid the money.

Within  
what time,  
and in what  
manner put  
in, in the  
country.

Within  
what time.

or *quarto die post* of the return of the writ; but that, on process returnable the second or any subsequent return of the term, the bail should be put in in any other city or county than London or Middlesex, within eight days after the return of the process, or day on which it is actually made returnable. In the Exchequer, in country causes, eight days are allowed, whether the process be returnable on a general return day, or day certain; and in all the courts, it has been before remarked, that the time is computed exclusively of the return day.

As a commissioner or a judge, when on the circuit, is merely considered the agent or representative of the court, for the specific purpose of taking the recognizance, and is not authorized to retain or file the bail-piece, the bail are not considered as put in, until that document has been transmitted to London and deposited with the proper officer. It is therefore material that the recognizance should be acknowledged within sufficient time to enable the commissioner or judge to transmit the bail-piece, before the period for putting in bail has expired.

In what  
manner  
taken.

In the Court of King's Bench, whether the action has been commenced by bill or by original, the bail are taken on a bail-piece, prepared in a similar manner, and comprising the same requisites as in actions by bill in town; (c) with the additional statement that the party, before whom the bail were taken, was a commissioner. (d)

In the Courts of Common Pleas and Exchequer, the recognizance is also taken on a bail-piece, but in the former, in a sum certain, and not in general terms, to satisfy the condemnation.

After the bail have entered into the recognizance, an affidavit of its having been duly acknowledged, must be

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(c) R. T. 8 W: Reg. 3 K. B. Hall's bail, 1 Chit. Rep. 79.

(d) Simmon's bail, 1 Chit. Rep. 9.

prepared and annexed to the bail-piece. This document is called the affidavit of caption, and should be made by the attorney, or by some other person who may have accompanied the bail to the commissioner, and should be sworn either before a judge of the court whence the process issued, or before a commissioner authorized to take affidavits, not being the defendant's attorney, or the commissioner before whom the bail was put in.<sup>(e)</sup> The place where the oath was administered must be correctly stated in the jurat.<sup>(f)</sup> When the bail is taken by a judge of assize on the circuit, an affidavit of the due acknowledgment of the recognizance is unnecessary, as the bail-piece is retained by the clerk, and he enters it in the proper book on his return to town.<sup>(ff)</sup>

Within what time, and in what manner put in, in the country.

In what manner taken.

As the stat. 4 and 5 W. & M. c. 4. s. 2. enacts that the bail-piece shall be transmitted to some or one of the justices of the respective courts, the Court of King's Bench, almost immediately after the passing of the act, by an express rule,<sup>(g)</sup> directed that the bail-piece should be transmitted to the Chief Justice or other judge of the court, in eight days, if taken within forty miles of London or Westminster; or if taken above that distance, in fifteen days after the taking thereof. And a similar rule in the Common Pleas, requires that the bail-piece, if taken within forty miles of London, should be transmitted within ten days; or if taken above that distance, within twenty days after the taking thereof, unless all the judges are on their circuits; and then, as soon as any one of them is returned.<sup>(h)</sup> But these rules appear to be virtually, although not positively, abrogated by the 8 Anne, R. 1.

Bail-piece, when and how transmitted.

<sup>(e)</sup> R. T. 8 W. Reg. 3. K. B. <sup>(f)</sup> Webster's bail, 1 Chit. Rep. 10.  
<sup>(ff)</sup> Vide ante, p. 337, that the statute dispenses with the necessity of an oath.

<sup>(g)</sup> 8 W. 3. Reg. 3. s. 2. K. B. R. 10: 5 W. & M. 3. C. P.

<sup>(h)</sup> Id.

Within  
what time,  
and in what  
manner put  
in, in the  
country.

Bail-piece,  
when and  
how trans-  
mitted.

which, it has been seen in the Court of King's Bench, directs that bail should be put in within six days exclusive, after the return of the process, or after the *quarto die post* by original; and in the Common Pleas, within eight days after the *quarto die post*, if the process be returnable on the first return; or if on any other return, within four days after the *quarto die post*. In practice, the latter rule has been adopted, on the ground that the statute 4 & 5 W. & M. c. 4. s. 2. does not make the taking of bail by a commissioner equivalent to the putting in bail before a judge in town; the former proceeding being considered merely initiatory to the latter, and therefore, unless the bail-piece is actually transmitted and filed within the period prescribed by the last-mentioned rule, an assignment may be taken of the bail-bond. (i)

The rule of 8 W. 3. if not superseded by the 8 of Anne, can only apply to instances where the bail is taken before a commissioner in vacation, and a considerable period intervenes between the taking of the bail and the return of the writ; (k) but it is more prudent, in all cases, to transmit the bail-piece within the time prescribed by the former rule, than to rely on this distinction.

In actions by original in the King's Bench or Common Pleas, the bail-piece, being transmitted and allowed by the judge, should be filed with the filacer of the county where the venue is laid. (l)

Notice of  
bail.

The notice of bail should be accurately entitled, but it is not essential that the names and residence should be stated; it is sufficient, in actions by bill, to state that the bail-piece is filed at the judge's chambers, with an affidavit of the due execution thereof; or in actions by original,

(i) Rule and orders, K. B. Imp. K. B. 196. Imp. C. P. 187, 8.

(k) 1 Sel. 145.

(l) Harris v. Calvart, 1 East, 603.



or in the Common Pleas, that the bail has been allowed by a judge, and that the bail-piece and affidavit are filed with the filacer.

Within  
what time,  
and in what  
manner put  
in, in the  
country.

In serving the notice of bail, the same rules should be observed as in town causes; and it is usual, although not absolutely necessary, at the same time to deliver a copy of the affidavit of justification, which will, in general, induce the plaintiff to abstain from entering an exception.

Notice of  
bail.

### SECTION III.

#### OF EXCEPTING TO, AND JUSTIFYING BAIL.

By the rules of all the courts<sup>(m)</sup> “every commissioner is required to have a book, kept purposely for entering exactly the names of the defendant and his bail, and of the plaintiff, as it is in the bail-piece, and the time of the taking thereof, and the name of him by whom such bail shall be transmitted; and also, in the King’s Bench and Exchequer, the name of the attorney for the defendant: and the plaintiff’s attorney shall be at liberty to repair to the commissioner’s book for the names of the bail, to the end that he may inquire of the sufficiency of them; and if they are found insufficient, he may except against them within twenty days after the said bail is transmitted, and notice to the plaintiff or his attorney of the taking thereof. And, in that case, the defendant must either put in better bail, or the cognizors of such bail must justify themselves in open court, either by affidavit taken before such commissioner that took the said bail, or by

Excepting to  
bail.

<sup>(m)</sup> R. T. 8 W. 3. Reg. 3 & 4. K. B. 5 W. & M. s. 45. C. P. 1 Burt. 128, 9. Manning’s Exch. Prac. 106.

Of except-  
ing to, and  
justifying  
bail in the  
country.

Excepting  
to bail.

Notice of  
justification.

Mode of  
justifying.

Affidavit of  
justification.

bath made in court, or before one of the judges of the said courts respectively."

If an affidavit of justification has been made, and a copy served upon the defendant, it is not usual to except to the bail, unless there be substantial grounds of objection; if, however, they be excepted to, it must be entered and notice thereof given within the same time, and in the same manner, as in town causes. (n)

This analogy also prevails with regard to the notice of justification, excepting that when the bail are to justify by affidavit, that fact is usually specified in the notice.

It has been seen in a preceding chapter, (o) that bail put in in town must attend and justify in open court, unless the consent of the defendant's attorney to justify at chambers, has been previously obtained. And the same practice prevails, where they put are in before a commissioner, if they reside in London or Westminster, or within ten miles of either of these places; but if their residence exceed that distance from the metropolis, their personal attendance is dispensed with, and they are permitted to justify by affidavit. (p) And if a defendant, who generally resides in the country, be arrested in London, in a town cause, the bail may nevertheless justify in the latter mode. (q)

The affidavit of justification is usually sworn to and transmitted with the affidavit of the caption, and a copy of it should be delivered to the plaintiff's attorney, at the time of serving him with notice, that the bail-piece has been filed.

This affidavit should be entitled of the proper court, and in the cause, and state that the bail are housekeepers

(n) See ante, p. 300.

(o) Ante, p. 316.

(p) 4 & 5. W. & M. c. 4. s. 2.

(q) White v. Thomas, 5 Price, 13.

or freeholders, and the addition of their degree or mystery, as well as their names, and places of residence, should be described. (r) An inaccuracy in spelling the names, although they may be *idem sonans*, will render the affidavit invalid. (s)

Of excepting to, and justifying bail in the country.

Affidavit of justification.

It must also be averred, that the bail are respectively worth double the sum endorsed on the writ, over and above what will be sufficient to pay all their just debts. An allegation, that they are worth a certain sum, *exclusive* of their debts, is insufficient, as the obvious meaning of these words is not that they are possessed of the necessary amount, after payment of their debts; but excluding their debts from the calculation, they would be in possession of the requisite sum. (t) But an affidavit that A. and B., and each of them, were worth double the amount for which they were bail, *beyond* their debts, was held valid. (u)

In describing the property of the parties, where they have become bail in several actions, the practice of the different courts does not appear to have been uniform. In the King's Bench, it is sufficient for the bail, in each action, to swear that they are worth double the amount of the sum required in that particular suit, after the payment of their just debts, without alleging that they are worth double the amount of the sum for which they have justified, over and above their liability as bail in other actions. (x) But in the Common Pleas it has been decided, (y) that each affidavit ought to state that the bail are in possession of property to the amount of double the

(r) Anon. 1 Chit. Rep. 292.

(s) William's bail, 1 Chit. Rep. 495. *Brown v. Jacobs*, 2 Esp. 726.


(t) *Horne v. Carr*, 4 Taunt. 726.

(u) *Hobson's bail*, 2 Chit. Rep. 95.

(x) *Steven's bail*, 1 Chit. Rep. 305. *Atwood v. Emery*, id. n. (a)

(y) *Field v. Wainwright*, 3 B. & P. 39.

Of except-  
ing to, and  
justifying  
bail in the  
country.

  
Affidavit of  
justification.

aggregate of the sums sworn to, in all the actions in which the parties have become bail. (x) This decision, however, appears no longer tenable, for in *Reid v. Cornfoot* (a) it was adjudged not to be necessary for persons justifying as bail in several actions, to specify the relative priority in which the affidavits were sworn, nor that they should include in the computation of their own debts their liability as bail in other actions. Mr. Justice Burrough remarked, "that if a man justifies bail by affidavit, on two successive days in two several actions, it never yet was seen that the latter affidavit particularized his liability on the former action, more than any other of the debts of the bail." (c) In the Court of Exchequer, the rule appears to be, that the parties must swear that they are worth double the aggregate amount of the sums sworn to in all the actions in which they have become bail. (d) In *Jones v. Ripley*, (e) one of the endorsers of a bill of exchange had become bail for another, and both of them were also bail in other actions; it was determined that they ought to have deposed, that they were worth double the sum due on the bill, over and above all their debts, and the sums for which they had justified in other actions; and that the bail, who was an endorser should have included in his affidavit the amount of the bill on which the action was brought.

An affidavit made in English, by a person imperfectly acquainted with that language, and requiring the assistance of an interpreter, would, it is conceived, be bad, on account of the difficulty of assigning perjury upon the

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(x) *Reid v. Cornfoot*, 7 Taunt. 324. 1 B. Moore, 29. s. c. less fully reported. (a) *Id.*

(c) In *Reid v. Cornfoot*, 7 Taunt. 326.

(d) Anon. 1 Chit. Rep. 306. n. (a)

(e) 3 Price, 261.

unsworn verbal translation. (*f*) The proper course seems to be, that the affidavit should be sworn in the language of the deponent, and that either a sworn translation should be annexed, or a person possessing competent knowledge of the deponent's language, should attend the court upon the motion for justification. One of the bail may interpret for his companion. (*g*)

Of except-  
ing to, and  
justifying  
bail in the  
country.

Affidavit of  
justification.

The name of each of the deponents, (*h*) and place at which the affidavit was sworn, should be correctly stated in the jurat. (*i*) And if the party is obviously illiterate, it must be alleged that the deposition was read to the deponent, and that he appeared perfectly to understand its contents. (*k*) It should be also specified, that the deponent's mark or signature was affixed in the presence of the commissioner (*l*)

The affidavit ought not to be sworn before the commissioner by whom the acknowledgment was taken; but it is not material that both bail should justify before the same commissioner; (*m*) nor is it necessary that the affidavit of justification should be made before the same commissioner as that before whom the affidavit of taking the bail was sworn. (*n*)

The bail may be opposed either by the production of counter affidavits, or by suggesting that there is some defect or irregularity apparent upon the face of the bail-piece, affidavit of justification, or other written document. Where the objections, however, are merely of

Opposing  
bail.

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(*f*) *Chistie v. Filleul*, 2 Bla. 1323. See *Spanish Sailor's case*, 2 ib. 1324. Ante, 83.

(*g*) *Christie v. Filleul*, 2 Bla. 1323.

(*h*) Anon. 1 Chit. Rep. 495. *Drabble v. Denham*, 2 id. 92.

(*i*) *Carrington's bail*, 1 Chit. Rep. 495. 7 Price, 662.

(*k*) *Allworthy's bail*, 2 Chit. Rep. 92.

(*l*) Anon. id. 92.

(*m*) Anon. 2 Chit. Rep. 91.

(*n*) *Brealey v. Holt*, id.

Of except-  
ing to, and  
justifying  
bail in the  
country.

Opposing  
bail.

a technical nature, or founded on some clerical error, and no intention to mislead is indicated, they will be overruled, or time will be granted to amend the defect. Thus, where the bail-piece is not properly entitled of the court, or in the cause; or if it does not appear that the person before whom the bail was taken is a commissioner, (p) or the place at which the recognizance was taken is not properly described, (q) or the jurat of the affidavit of caption does not mention at what place it was sworn, (r) or omits to state the name of all the deponents, (s) or contains any interlineation or erasure, (t) or in the case of an illiterate person, does not notice that the affidavit was read to the deponent, and that he seemed perfectly to understand its contents, (u) or that he subscribed his name, or wrote his mark in the presence of the commissioner, (x) or where, in the affidavit of justification, the names and place of residence of the bail, or their degree or mystery have been incorrectly stated, (y) or where a trifling variation has been made in the spelling of the name of the bail, as Lloyd for Loyd, (z) time will be granted to rectify these and similar mistakes. When the opposition to the bail is derived from some extrinsic cause, not apparent upon the face of the written document, the objection should be pointed out and supported by an affidavit, distinctly and circumstantially detailing the grounds on which the bail are opposed. If the plaintiff insist that the parties are incompetent, on account of their having

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- (p) Simmon's bail, 1 Chit. Rep. 9. Hayward's bail, id. 1.  
 (q) Simmons v. Morgan, 1 Chit. Rep. 10.  
 (r) Webster's bail, 1 Chit. Rep. 10. Carrington's bail, id. 495.  
 (s) Anon. 1 Chit. Rep. 495. (t) Id.  
 (u) Allworthy's bail, 2 Chit. Rep. 92.  
 (x) Anon. 2 Chit. Rep. 92.  
 (y) Anon. 1 Chit. Rep. 292. Hayward's bail, id. 2.  
 (z) William's bail, 1 Chit. Rep. 495.

become bail in other suits, he should oppose them by an affidavit, stating that they have become bail in certain enumerated causes, for specified sums, and that they are not worth double the aggregate amount of the claims in all the actions. (zz)

Of excepting to, and justifying bail in the country.

Opposing bail.

Rule of allowance.

After the bail have justified, the rule of allowance should be drawn up, and the other proceedings conducted precisely as in ordinary cases.

## SECTION IV.

### OF PUTTING IN AND JUSTIFYING BAIL IN VACATION, AND WHEN THE DEFENDANT IS IN ACTUAL CUSTODY.

As defendants were not unfrequently detained in custody from inability to obtain bail, until the term in which they were arrested had expired; and as some doubts were entertained, whether bail could be legally taken in vacation, the legislature, it has been seen by a recent statute, (a) empowered the Judges of the Courts of Record at Westminster or Dublin, to admit the defendant to bail in the same manner, and under the same regulations as in term. In conformity with this act; it has been decided, that bail may be put in and perfected at any time pending the suit, or even after verdict, (aa) or final judgment, if the defendant has not been charged in execution, (b) or a writ of *ca. sa.* has not been sued out. (bb) The

(zz) Steven's bail, 1 Chit. Rep. 305.

(a) 43 Geo. 3. c. 46. s. 6. Ante, p. 334.

(aa) Dyott v. Dunn, 2 Chit. Rep. 72.

(b) Stanton's bail, id. 73. semb. s. c. by the name of Hill v. Stanton, 1 Tidd, 7th ed. n. (f) See Jackson v. Knight, Barnes, 92.

(bb) Thackray v. Harris, 1 B. & A. 212.

Of putting  
in and jus-  
tifying, in  
vacation,  
&c.

statute is, however, confined to arrests on mesne process, issuing out of the superior courts of Westminster, and does not extend to persons in custody upon a *habeas corpus* removing the cause from an inferior jurisdiction into the Court of King's Bench. (c)

How put in  
in vacation.

In vacation, the practice with respect to putting in bail is the same as in term time, except that the notice of justification states, that the bail will justify at chambers instead of in open court. At the appointed time the bail should attend at the judge's chambers, and wait there an hour; and if, at the expiration of that time, the attorney or the plaintiff does not appear to oppose the justification, the bail will be permitted to justify, upon producing an affidavit of service of notice of justification. If the opposite party attend, the bail may be opposed and examined in the same manner as when they present themselves to justify in open court.

As soon as the bail have justified, the judge will make an order for their allowance and for the discharge of the defendant out of custody. (d)

How put in  
term time,  
when de-  
fendant is in  
custody.

When the defendant is in *custody*, the bail in term time are put in, justified, and opposed in the same manner as when he is at large, excepting, that in the bail-piece or memorandum given to the filacer, in the notice of bail and notice of justification, the circumstance of the defendant being in custody is mentioned.

Costs of  
several no-  
tices.

The courts, it is said, have no power to order the payment of costs of several notices of justification given in vacation in the same suit by different attorneys; (e) but

(c) *Steer v. Smith*, 1 Chit. Rep. 44.

(d) *Bignold v. Lee*, 1 B. & C. 285. 2 D. & R. 436.

(e) *Steer v. Smith*, 1 Chit. Rep. 44. s. c. 80. ——— *v. Clarke*, 2 id. 89. Sed vide *Holward v. André*, 1 B. & P. 32. *The King v. the Sheriff of Middlesex*, 1 Taunt. 56. Gen. Reg. H. T. 2 & 3 Geo. 4: 5 B. A. 559.



if they have been delivered vexatiously by the same attorney, the court will interpose its authority, and compel him personally to pay the costs. (*f*)

Of putting  
in and jus-  
tifying, in  
vacation.

When bail are put in after final judgment, the terms of the recognizance are different from the usual form; it should be to pay the condemnation money of the judgment, and the bail, taken in double that amount. (*g*)

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## CHAPTER X.

### OF THE NATURE AND EXTENT OF THE LIABILITY OF THE BAIL.

THE form of the recognizance of bail, it may be remembered, varies in the different courts. (*a*) In actions by bill in the King's Bench or in the Exchequer, the undertaking of the bail is in general terms, that if the defendant be condemned in the action, they will pay the condemnation money, if the defendant shall not pay the same, or render himself to the prison of the Marshal, or the prison of the Fleet. In actions by original, in the King's Bench, as well as in the Common Pleas, their recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to, or 1000*l.* beyond that sum, if it exceed 1000*l.*, subject to the same condition. Therefore, if the defendant be condemned in the action, and do not pay the condemnation-money, or render himself to the person of the Marshal or Warden in the due time; or if there be several defendants, and they do not all render themselves, (*b*) the recognizance is for-

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(*f*) *Steer v. Smith*, 1 Chit. Rep. 44. s. c. 80. — *v. Clarke*. 2 id. 89.

(*g*) *Stanton's bail*, 2 Chit. Rep. 73:

(*a*) Ante, p. 289:

(*b*) *Astree v. Ballard*, 1 Vent. 315. 2 Lev. 195, s. c.

Liability of  
bail.

feited, and the bail are liable to be sued thereon, unless discharged by some of the acts to be subsequently enumerated.

In the present and four succeeding chapters, it is proposed to examine

*The nature and extent of the liability of the bail.*

*The proceedings preparatory to their being sued.*

*The proceedings against them by action of debt.*

*The proceedings against them by scire facias.*

*The circumstances under which the bail are discharged.*

In general, the responsibility of bail continues as long as their names remain on the bail-piece; and this rule obtains, even although they have not justified. (c) And if, after being rejected, proceedings be commenced against them, in consequence of the names not being struck out of the recognizance, the court will only relieve them, on the condition of paying the costs incurred by the omission. (d)

In the K.B. According to the ancient practice of the Court of King's Bench, the bail were liable on their recognizance, not only to the particular action in which they had expressly become bail, but by implication of law in respect of all actions brought by the same plaintiff against the same defendant, within the term in which the first suit was commenced. (e) This system has since been altered by two rules of court, (f) by which it is directed, "that

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(c) *Waller v. Green*, Sayer 308. *Fulke v. Bourke*, 1 Bl. Rep. 462. *Jones v. Tubb*, 1 Wils. 337. *Rex v. the Sheriff of Essex*, 5 T. R. 633. *Gould v. Holmstrom*, 7 East, 580. *Bramwell v. Parmer*, 1 Taunt. 426. See *Taylor v. Shapland*, 3 M. & S. 328.

(d) *Humphry v. Leite*, 4 Burr. 2107. *Gould v. Holmstrom*, 7 East, 580.

(e) 4 Inst. 179. Anon. 1 Mod. 16. *Genbaldo v. Cognoni*, 1 Salk. 102. *Baskerville v. Brocket*, Cro. Jac. 449. *Richardson v. —* 2 Show. 183. *Baber v. Edwards*, id. 340. *Batfield v. Watts*, 2 Sid. 163. 1 Com. Dig. 490. 1 Bac. Ab. 214, 215.

(f) T. T. 22 Car. 2. E. T. 5 Geo. 2:

where the plaintiff declares for, and recovers a *greater sum* than is expressed in the process on which he declares, the bail shall be liable for so much only as is sworn to and endorsed on the process, or for *any lesser* sum which the plaintiff, in such action, shall recover, together with the costs of the original action.”(g) In conformity with these rules, the court will stay the proceedings in an action on the recognizance, (h) or order an *exoneretur* to be entered on the bail-piece, on payment of the sum sworn to and costs, whether the action be commenced by bill or by original writ; (i) even although the sum sworn to be less than the damages actually recovered, or the sum named in the process, (k) and the defendant in the original action may have gone abroad. (l)

Liability of  
bail.

In the K.B.

The liability of the bail is confined to the causes of action specified in the affidavit of debt, (m) and to the costs of the original suit, and does not extend to the costs of a writ of error brought by their principal; (n) though, where error is brought after the bail are fixed, proceedings by *scire facias* against them will be stayed pending error, only on the terms of undertaking to pay the condemnation money, and the costs of the *scire facias*; and where there is no bail in error, the costs of the writ of error in case the judgment should be affirmed. (o) But,

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(g) *Jackson v. Hassell*, 1 Doug. 330. *Martin v. Moor*, 2 Stra. 922. *Coles v. Hayne*, 6 T. R. 246. *Stevenson v. Cameron*, 8 T. R. 29. *Jacob v. Bowen*, 2 Smith, 402. 6 East, 312. s. c. *Clarke v. Bradshaw*, 1 East, 86. *Villers v. Parry*, 1 Ld. Raym. 547. See *Lofft*, 545. See *Howell v. Wyke*, 1 B. & B. 490. *Peterken v. Sampson*, cited 1 Tidd, 305. n. f. 7th ed.

(h) *Tranel v. Rivaz*, 1 East, 91. n. (c).

(i) *Jacob v. Bowes*, 6 East, 312. 2 Smith, 402. s. c.

(k) *Clarke v. Bradshaw*, 1 East, 90.

(l) *Tranel v. Rivaz*, 1 East, 91. n. (c).

(m) *Wheelwright v. Jutting*, 1 B. Moore, 51. 7 Taunt. 304. s. c.

(n) *Yates v. Doughan*, 6 T. R. 288.

(o) *Ritson v. Francis*, 2 Stra. 877. *Richardson v. Jelly*, id. 1270. *Buchanan v. Alders*, 3 East, 546. *Copous v. Blyton*, 1 N. R. 67.

Liability of  
bail.

In the K. B.

where a writ of error has been allowed before the time limited for the render of the principal has expired, the bail may stay proceedings against them, on undertaking in the alternative, either to pay the sum recovered, or to surrender the defendant within six days after the affirmance of the judgment. (p) This expression means after the final determination of the cause, supposing two or more writs of error to have been successively brought. (q)

If an action of debt be properly commenced and conducted against the bail, they will be compelled to pay the costs of that action as well as the debt sworn to, and costs in the original suit; (r) but they are not liable to the costs of a *scire facias*, whether the original action were by original or bill, if they do not appear and plead, or join in demurrer. (s)

When the defendant in the original action is holden to bail under a judge's order, the bail in such a case are liable to the extent of the sum required by the judge; and if a less sum be recovered than the sum ordered and costs, (t) the bail are only liable for the sum recovered in the particular action in which they have become bail, and therefore, are not liable to interest accruing on the amount recovered subsequent to the judgment, (u) or to equitable costs not necessarily included in the judgment against the principal; (x) nor will the court compel the bail, after render of their principal, to pay the expenses of resist-

(p) *Sprang v. Monprivatt*, 11 East, 316.

(q) *Kershaw v. Cartwright*, 5 Burr. 2819.

(r) *Rex v. Lyon*, 3 Burr. 1461. *Perigal v. Mellish*, 5 T. R. 363. *Byrne v. Aguilar*, 3 East, 306. *Abbott v. Rawley*, 3 B. & P. 13. *Hughes v. Poidevin*, 15 East, 253. *Smith v. Lewis*, 16 id. 168. 2 Chit. Rep. 100. s. c. *Creswell v. Horn*, 1 M. & S. 742.

(s) 8 & 9 W.3. c. 11. s. 3.

(t) *Calverag v. De Miranda*, Barnes, 76. *Dahl v. Johnson*, 1 B. & B. 205.

(u) *Waters v. Rees*, 3 Taunt. 502.

(x) *Baldwin v. Morgan*, 2 Stra. 826.

ing a vexatious application by the latter, to be discharged as an insolvent. (y)

Liability of  
bail.

In the K.B.

Where the defendant in the action gave a *cognovit* for the debt and costs, payable by seven instalments; and after the bail were fixed, the principal was discharged under an act passed for discharging insolvent debtors in custody for debts due at a certain day prior to the bail being fixed, at which day three only of the instalments were payable, and afterwards the principal was discharged under the act, when only two or more of the instalments had become payable; yet it was held, that the bail were liable for the whole condemnation-money, the entire debt, *quæ* debt, being due *instante*, with a stay of execution only for certain portions at certain times. (z)

In the Court of Common Pleas, each of the bail is separately liable for the sum recovered, to the full extent of the penalty of the recognizance, being double the amount of the sum sworn to, or endorsed on the writ under a judge's order. (a)

In the C.P.

Doubts having arisen in the Court of Exchequer respecting the extent of the liability of bail, that court, by an express rule, (b) has ordered, "that upon a recognizance of bail in any action brought therein, the bail shall not be jointly or severally liable in such action for more in the whole than the amount of the sum sworn to in the affidavit of the cause of action, together with the

In the Ex-  
chequer.

(y) *Winstanley v. Head*, 4 Taunt. 193.

(z) *Shakespeare v. Phillips*, 8 East, 433.

(a) *Calverag v. De Miranda*, Barnes, 76. *Dahl v. Johnson*, 1 B. & P. 205. *Howell v. Wyke*, 4 B. Moore, 167. 1 B. & B. 490. s. c. See 1 East, 91., 6 East, 312. In *Howell v. Wyke*, 1 B. & B. 490., the court, on motion, refused to assimilate the practice of the Court of Common Pleas to the Court of King's Bench, but observed, that in consequence of what has been urged, they might be induced to consider the propriety of laying down some new rule.

(b) R. H. 38 Geo. 3. Mang. Exch. App. 223.

Liability of  
bail.

In the Ex-  
chequer.

costs of such action, unless any proceedings be had upon their recognizance; in which case, they shall also be subject to such other costs as they may be by law liable to.

## CHAPTER XI.

### OF THE PROCEEDINGS PREPARATORY TO SUING THE BAIL.

AFTER a judgment has been obtained in bailable actions, the successful party may elect either to enforce it by process of execution against the principal or his property, or to proceed against the bail on their recognizance. The latter only is to be here investigated.

Ca.sa. against  
the princi-  
pal.

As the bail merely stipulate for the render of the principal, and not for the liquidation of the demand; and the plaintiff being entitled, in his discretion, to sue out execution either against the person or property of the original defendant, it is proper that some positive act should be done by the former indicative of his intention to seek his remedy against the person, and not against the property, of the latter. It has upon this ground become a settled rule, that before any proceedings can be had against the bail in the action, upon their recognizance, a *capias ad satisfaciendum* must be sued out against the principal, and returned *non est inventus*; (a) for the bail are not obliged to render their principal before they are made acquainted with the species of execution the plaintiff intends to adopt; and an adherence to this rule

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(a) R. E. 5 Geo. 2. Reg. 2. a. South v. Griffith, Cro. Car. 481. Wilmore v. Clerk, 1 Ld. Raym. 156. Weddall v. Jocar, 10 Mod. 267.

has been considered so important, that in a very useful publication, (b) it is stated, that if the plaintiff, instead of suing out a *ca. sa.* against the principal, sue out a *fi. fa.* or *elegit* against his property, the bail are thereby discharged; but this doctrine has been since repudiated, and it is now clearly settled that the *ca. sa.* will be available, notwithstanding a *fi. fa.* has been sued out against the principal; (c) or even a part of the debt levied under it, (d) unless the whole amount has been obtained under the execution for which the bail are liable.

*Ca. sa. against the principal.*

Although a defendant is not in general entitled to be bailed after a *ca. sa.* has been actually sued out against him, yet the court determined in *Thackray v. Harris*, (e) (where such a writ had been lodged with the sheriff and *non est inventus* returned, and proceedings being had against the bail, they rendered the principal in time, the defendant being then bailed again and discharged,) that proceedings could not be had against the last bail, without taking out a fresh *ca. sa.*

The *ca. sa.* against the principal must regularly be sued out within a year after the signing of the judgment, or otherwise it will be necessary, before any proceedings are had against the bail, to revive the judgment by *scire facias*, though an omission in this respect, it was at one time thought, could not be made the ground of an objection on behalf of the bail; (f) but this opinion appears now untenable, as the court, in a recent case, set aside an execution against bail, sued out above a year

(b) 2 Sellon, 44.

(c) MS. E. T. 1820. cited 1 Archbold's Prac. Addenda, 13. MS. M. T. 1821. s. p.

(d) Per Gibbs, C. J., 1816. cited 2 Manning's Prac. 472. n. (r) *Waring v. Jarvis*, cited id. 475. n. (m). (e) 1 B. & A. 212.

(f) *Cholmondeley v. Bealing*, 2 Ld. Raym. 1096. Holt, 90. 6 Mod. 304. s. c.

*Ca. sa. against  
the princi-  
pal.*

After a writ  
of error.

after judgment obtained against the principal, for want of a *scire facias* to revive it. (g)

As a writ of error suspends all further proceedings in the court below, from the time of allowance, the defendant in error cannot afterwards sue out a *ca. sa.* against the principal, for the purpose of instituting proceedings against the bail; (h) and the circumstance of the *ca. sa.* having been sued out before the allowance of the writ of error, will not authorize the plaintiff below, after the allowance, to proceed against the bail, although the writ may have previously lain four days in the sheriff's office; (i) nor can he even call for a return of the writ; (k) and if the writ be returned after notice of the allowance, (though on the same day) and the *scire facias* be afterwards sued out against the bail, the court will set aside the proceedings with costs; (l) or the bail, in such a case, may plead to the *scire facias*, that after the issuing and before the return of the *ca. sa.* against the principal, a writ of error issued and was duly allowed, without stating it to be returned; (m) and if bail in error (when requisite) were not put in, the plaintiff must allege that in his replication. (n)

When a writ of error is not allowed till after the return of the *ca. sa.* the bail may be sued pending the writ of

(g) *Thomas v. Young*, 15 East, 617. In this case the proceedings had been delayed by a *cognovit* unknown to the bail.

(h) *Dudley v. Stokes*, 2 Bl. Rep. 1183. *Sweetapple v. Goodfellow*, 2 Stra. 867. *Miller v. Newbald*, 1 East, 662. *Buchanan v. Alders*, 8 East, 546. *Sprang v. Monprivatt*, 11 id. 316.

(i) *Perry v. Campbell*, 3 T. R. 390. *Sampson v. Brown*, 2 East, 439.

(k) *Smith v. Nicholson*, 2 Stra. 1186. *Parkins v. Wilson*, 2 Ld. Raym. 1256.

(l) *Miller v. Newbald*, 1 East, 662.

(m) *Sampson v. Brown*, 2 East, 439.

(n) *Sampson v. Brown*, 2 East, 445. as to pleading matters of practice, see *Walmesley v. Macey*, 5 B. Moore, 168. *Cherry v. Powell*, 1 D. & R. 50. *Ball v. Swan*, 1 B. & A. 393.



error, (o) unless an order of court has been obtained to suspend the proceedings against the bail, during the period in which the writ of error continues undetermined. (p) Where the writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recorded, or to surrender the defendant within four days of the determination of the writ of error, if determined in favour of the original defendant; (q) but where error is brought after the bail are fixed, proceedings by *sci. fa.* against them will only be stayed pending error, on their undertaking to pay the condemnation-money and costs of the *scire facias*; and where there is no bail in error, the costs of the writ of error, in case of affirmance. (r)

*Ca. sa.* against the principal.

After a writ of error.

The bail of a member of parliament, under stat. 4 Geo. 3. c. 33. cannot be sued pending a writ of error on the judgment against the principal; (s) and if the appeal be in any case to the House of Lords, the suing out of the *ca. sa.*, or proceedings against the bail, would be punishable as a contempt. (t)

The *ca. sa.* against the principal should be directed to the sheriff of the county, where the venue was laid in the original action.

*Ca. sa.* to whom directed.

In the Court of King's Bench, if the action against the principal were commenced by bill, the *ca. sa.* should be made returnable on a day certain, and have eight days

When returnable.

(o) *French v. Carsenore*, 1 Anst. 176.

(p) *Edwards v. Jameson*, Forr. 25.

(q) *Sprang v. Monprivatt*, 11 East, 316.

(r) *Buchanan v. Alders*, 3 East, 546. *Gostelow v. Wright*, Barnes, 86. *Copous v. Blyton*, 1 N. R. 67. See *Mannin v. Partridge*, 14 East, 598.

(s) *Curling v. Innes*, 2 H. Bl. 372.

(t) *Throgmorton v. Church*, 1 P. Wms. 685.

Ca. sa. against  
the princi-  
pal.

When re-  
turnable.

at least between the *teste* and return; or if the action were by *original*, the *ca. sa.* should be returnable on a general return day, and have fifteen days at least between the *teste* and return. (u)

In the Court of Common Pleas and Exchequer there must be fifteen days between the *teste* and return of the *capias ad satisfaciendum*. (x)

If there be any irregularity in the writ in this respect, the principal only, and not the bail, can take advantage of it. (y)

Teste of  
*ca. sa.*

The *ca. sa.* must not be tested of a term prior to that in which judgment was signed against the principal, and if there be any inaccuracy in this particular, the court will set aside the proceedings against the bail, even after execution has been levied. (z)

Ca. sa. must  
be left at  
the sheriff's  
office.

As the object of suing out a *ca. sa.* is to give the bail notice of the plaintiff's having elected to take out execution against the person of the principal, it is directed, that the writ shall lie four days, exclusive, in the sheriff's office, (a) which must be the last four days before the return; (b) and as a search cannot be made on a Sunday, such day is not reckoned as one of them, even although it be the last day of the four. (c) The writ, on its being left at the office, should be entered in the public book, and not in the private and secret list from which warrants are made out for actual arrest. (d)

(u) R. E. 5 Geo. 2. reg. 3. Ball v. Russel, 2 Ld. Raym. 1176. 2 Salk. 602. s. c. 2 Saund. 72. b. n.

(r) Wass v. Cornett, Barnes, 76.

(y) Cholmondeley v. Bealing, 2 Ld. Raymond. 1096. 6 Mod. 304. s. c. Campbell v. Cumming, 2 Burr. 1187. Sed vide, 15 East, 617.

(z) Gawler v. Jolley, 1 H. Bl. 74.

(a) R. E. 5 Geo. 2. reg. 3. a. K. B. Anon. 2 Salk. 599. Merrett v. Montfort, Barnes, 64. Laycock v. Arthur, Ca. Prac. C. P. 34.

(b) Cock v. Brockhurst, 13 East, 588.

(c) Howard v. Smith, 1 B. & A. 528.

(d) Hutton v. Reuben, 2 Chit. Rep. 102. 5 M. & S. 323. s. c.

Under particular circumstances the bail have been permitted, after subsequent proceedings, to object that the *ca. sa.* has not lain in the office prescribed, or the proper number of days. (e)

*Ca. sa. against the principal.*

Return to the *ca. sa.*

After the expiration of the four days, the plaintiff should obtain a return of *non est inventus*, which the sheriff is justified in making, notwithstanding he may know where the principal is to be found; (f) but this formal return to the process cannot be made where the defendant is in the actual custody of the sheriff, although it be at the suit of another person, (g) or even on a criminal charge. (h) And where such a return has been made, the court will set it aside, together with the subsequent proceedings against the bail, and order the money levied under an execution, to be returned against them. (i)

Consequences of their being no *ca. sa.*

If a *ca. sa.* has not been regularly issued, and an action of debt or *sci. fa.* has been sued out against the bail, the court, it has been intimated, would not quash the *sci. fa.* or stay the proceedings on motion, but compel the bail to plead the matter in their discharge: the tenability, however, of this conjecture, appears extremely doubtful, for, as the court, in several recent cases, have interposed and set aside the proceedings, where less material irregularities have been committed,—as neglecting to have it regularly entered in the sheriff's public book, or duly returned,—it is difficult to conceive on what ground they could refuse to interfere when no *ca. sa.* whatever has been issued. (k)

(e) *Cock v. Brockhurst*, 13 East, 588.

(f) *Hunt v. Coxe*, 3 Burr. 1360. 1 Bl. Rep. 393. s. c. *Sillitoe v. Wallace*, 2 Tidd, 1128. n. (i), 7th ed.

(g) *Burks v. Maine*, 16 East, 2. *Forsyth v. Marriott*, 1 N. R. 251.

(h) *Ward v. Brumfit*, 2 M. & S. 238.

(i) *Id.* *Forsyth v. Marriott*, 1 N. R. 251.

(k) *Hutton v. Reubens*, 5 M. & S. 323. 2 Chit. Rep. 102. *Burks v. Maine*, 16 East, 2. *Forsyth v. Marriott*, 1 N. R. 251. *Ward v. Brumfit*, 2 M. & S. 238. *Vide post*, 366.

*Ca. sa.* against  
the princi-  
pal.

Of filing the  
return to  
the *ca. sa.*

According to the strict rules of practice, the *ca. sa.* should be filed as soon as it is returned, but in the ordinary routine of business, this is scarcely ever done; and it seems, that if it be filed at any time before replying to a plea of no *ca. sa.*, it will suffice. (l) If the principal die after the return of the *ca. sa.*, and before it is filed the bail are fixed, the court will not stay the filing of the return in favour of the bail. (m)

Of filing the  
bail-piece.

On the *ca. sa.* being returned and filed, before any further proceedings are instituted against the bail, the bail-piece, in the King's Bench and Exchequer, should be obtained from the judge's or baron's chamber and filed with the proper officer. (n)

Of entering  
the recogni-  
zance on  
the roll.

As soon as the bail-piece has been filed in the King's Bench or Exchequer, or bail perfected in the Common Pleas, an entry of the recognizance must be made on the roll, which should be regularly docketted and carried into the Treasury Chamber. This step, in strictness, should be taken before any proceedings are had against the bail; (o) and it is indispensably necessary that the roll should be carried in before the bail are called upon to plead, for otherwise, as it is not esteemed a record until it is entered, (oo) they may plead *nul tiel* record; and where the recognizance roll has not been carried in till after they have pleaded, they may withdraw their plea, and the plaintiff would be liable to pay the costs occasioned by the omission. (p)

In the K.B.

In the King's Bench, in actions commenced by bill, the

(l) *Gee v. Fane*, 1 Lev. 225. *Hunt v. Coxe*, 3 Burr. 1360. 1 Bl. Rep. 393. s. c. See 2 T. R. 757. 6 id. 285. 1 East, 87.

(m) *Rawlinson v. Gunston*, 6 T. R. 284. *Perigal v. Mellish*, 5 id. 363. *Field v. Lafry*, cited 6 T. R. 285.

(n) Vide ante,


(o) R. E. 5 Geo. 2. reg. 3. (a) K. B.

(oo) Vide post, n. (q), p. 361.

(p) *Hartley v. Hodson*, 1 B. Moore, 430.

recognizance is entered by the plaintiff's attorney, after the delaration, with a memorandum of the term of which it is entitled. In actions by original, the recognizance is entered on the roll by the filacer, and it is his duty to docket it, and carry it in. The roll should be entitled of the term in which the process is returnable. In describing before whom the recognizance was taken, it is the invariable practice to enter it as taken in court, though actually taken by a judge at his chambers or by a commissioner in the country. (q)

Of entering  
the recogni-  
zance in the  
K. B.



In the Common Pleas, the filacer enters the recognizance and docket it. In that court, when it is taken by a judge at chambers, or by a commissioner in the country, it is entered specially ; it being a record immediately upon the first caption, and binds the lands before it is filed at Westminster. (s)

Of entering  
the recogni-  
zance in the  
C. P.

The recognizance in the Exchequer is entered on the roll in the same manner as in actions by bill in the King's Bench.

Entering re-  
cognizance  
in the Ex-  
chequer.

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(q) *Shuttle v. Wood*, 2 Salk. 564. 2 Ld. Raym. 966. *Chetley v. Wood*, 2 Salk. 658. 6 Mod. 42. s. c. *Coxeter v. Burke*, 5 East, 461. s. c. 2 Smith, 14.

(r) *Shuttle v. Wood*, 2 Salk. 564. 2 Ld. Raym. 966. s. c. 6 Mod. 132. s. c.

## CHAPTER XII.

## OF THE PROCEEDINGS AGAINST BAIL, ON THEIR RECOGNIZANCE, BY ACTION.

## SECTION I.

## OF THE PROCESS.

Election to  
proceed by  
debt or  
*sci. fa.*

THE recognizance being forfeited upon the return of *non est inventus* to the *capias ad satisfaciendum*, the plaintiff is entitled to proceed against the bail and their principal, if he be joined in the recognizance by action of debt or *scire facias*, at his election. Each mode of proceeding possesses its peculiar advantages. In the former, damages may be recovered for the detention of the debt or delay of execution; and if proceedings be stayed on condition of the debt and costs being paid, the bail must pay the costs of the suit against themselves, as well as the debt and costs of the original action. (a) But in the latter, no damages are recoverable, nor are costs allowed, unless the bail appear and plead, or join in demurrer, (b) and in the Common Pleas, a *ca. sa.* does not lie on a judgment on a *sci. fa.* against the bail. (c) For these reasons, an action of debt is, in general, the preferable remedy, though, where the bail keep out of the way, and cannot be served with process; or where it is not intended that they should have notice of the proceedings

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(a) *Perigal v. Mellish*, 5 T. R. 363. *Abbott v. Rawley*, 3 B. & P. 13. *Smith v. Lewis*, 2 Chit. Rep. 100. Et vide post.

(b) 8 & 9 Wm. 3. c. 11. *Knox v. Costello*, 3 Burr. 1791. *Abbott v. Rawley*, 3 B. & P. 14.

(c) *Troughton v. Clarke*, 2 Taunt. 113.

instituted against them, the remedy by *scire facias* must of necessity be adopted.

Of the process.

It is not compulsory on the plaintiff to sue the bail in the same court as that in which the recognizance was entered. (d)

In what court.

The action of debt on the recognizance may be brought against each *conusor* severally, or against all jointly, but not against an intermediate number. (e) Separate actions should, of course, be brought, where it is doubtful whether all the parties can be served with process.

May be sued jointly or severally.

As the sufficiency of the bail must have been proved, or admitted previous to their being allowed, the parties, in an action on the recognizance, cannot be arrested; (f) but a copy only of the process must be served on them. The only difference between proceedings against bail, and the proceedings in ordinary cases, is, that after the words in a plea of trespass, there must be inserted in the body of the *latitat* or other process, the following *ac etiam*, “and also to a bill of the said plaintiff against the said defendant in a plea of debt, upon recognizance, according to the custom of our court before us to be exhibited;” otherwise the defendant or his attorney will not be obliged to accept a declaration on the recognizance. (g) This clause was inserted in the proceedings, with the intention of apprizing the bail of the nature of their situation, and to protect them from being taken by surprise.

Only serviceable process.

The process against the bail on their recognizance, may be either sued out on the return-day of the *ca. sa.* against

When issued.

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(d) Anon. 3 Salk. 55. Fisher v. Branscombe, 7 T. R. 355. Knowlys v. Reading, 1 B. & T. 311.

(e) 2 Saund. 72. b. See 1 Saund. 154. n. 1 Poph. 161. 3 Burr. 1290. 3 T. R. 782. 2 Taunt. 254. Bac. Ab. Obligation, D. 4. 2 Vin. Ab. 68. pl. 7.

(f) Vide ante, p. 32.

(g) R. E. 15 Geo. 2. Ca. Prac. C. P. 18.

Of the process.

Teste of.

the principal, or afterwards; (h) and the court will assume that it was issued subsequent to the sheriff's return to the *ca. sa.*

There appears to be no objection to a writ, against the bail being tested before the return of the *ca. sa.* against the principal, provided it be not really sued out until after a return has been actually made. (i)

Upon whom served.

The process is served upon the bail, or bail and principal, as in ordinary cases.

## SECTION II.

### OF THE PLEADINGS.

Venue.

THE venue in the declaration must be laid in Middlesex, although the recognizance may have been taken by a commissioner, and all the prior proceedings conducted in a different county. (k)

Of the cause of action.

The recognizance should be set forth with certainty and precision, corresponding with the description adopted in the entry of it on the roll, and should correctly state in what court, at whose suit, and for what sum, or cause of action, the defendant has become bail; and if there be a material variance in any of these particulars, it will be fatal on the plea of *nul tiel record*. (l)

(h) *Shivers v. Brooks*, 8 T. R. 628: See the *King v. the Sheriff of London*, 2 East, 241.

(i) *Pinero v. Wright*, 2 B. & P. 235.

(k) *Hall v. Wenckfield*, Hob. 196. 2 Saund. 72. c. *Shuttle v. Wood*, 2 Salk. 600. 659. s. c. *Bond v. Isaac*, 1 Burr. 409. *Harris v. Calvart*, 1 East, 603. *Coxeter v. Burke*, 5 id. 461. 2 Smith, s. c. 14. *Hartley v. Hodgson*, 8 Taunt. 171. 2 B. Moore, 66. s. c.

(l) *Shuttle v. Wood*, 2 Salk. 564. 2 Ld. Raym. 966. s. c. 1 Wils. 284. *Mann v. Calow*, 1 Taunt. 221. *Coxeter v. Burke*, 5 East, 461. 2 Smith, 14. s. c. For forms in the different courts, see *Petersdorff's Index to Precedents in Pleading*, title *Recognizance*, and 1 B. & A. 153. 8 Taunt. 171.



Of the  
pleadings.  
Of the  
cause of ac-  
tion.

Where it was alleged, that the party “came before L., then and there being a commissioner duly appointed to take and receive recognizance of bail for the county of D., and *then and there* before L., being such commissioner, become bail,” it was considered that it was not only sufficiently averred, that the party before whom the bail was taken was legally authorized to take it, but that he was so in the county where it was taken, as the words “*then and there*,” could only refer to the last antecedent, the county of D. (m)

If the condition of the recognizance be—in case two defendants shall be condemned, and no joint condemnation be shewn, the declaration will be demurrable; as where, in an action against two, a recognizance of bail was given, “in case the said C. and D. should happen to be condemned, and should not pay or render themselves;” and the declaration thereon, after shewing that C. was condemned, but not D., assigned a breach, that “C. and D. did not pay nor render,” &c.; it was determined, that the breach, though in the words of the recognizance, was ill, since, with that allegation, it was quite consistent that C. had paid, or had rendered himself, which would have satisfied the recognizance; D. was not condemned, and therefore was neither bound to pay nor to render.(n) But where two were sued in an action of assumpsit, and a recognizance of bail was given, “in case the said C. and D. should happen to be condemned;” and it was averred in the declaration that C. was condemned, but no notice taken why D. was not also; it was considered sufficient, since D. might have died, or become a certificated bankrupt before judgment, which fact will be presumed. (o)

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(m) *Hartley v. Hodgson*, 8 Taunt. 171. 2 B. Moore, 66. s. c.

(n) *Wilkinson v. Thorley*, 4 M. & S. 33.

(o) *Id.* 34.

Of the  
pleadings.

Pleas.

*Nul tiel*  
record.

As the recognizance, when entered on the roll, is a record, and constitutes the foundation of the suit, the plea of *nil debet* will be bad on demurrer. (p)

When the recognizance has not been entered on the roll, or there is a variance in the statement of it, the plea of *nul tiel record* should be adopted. (q) But as this plea merely puts in issue the existence of the record, as described in the declaration, any extrinsic matter in discharge must be pleaded specially, and cannot be given in evidence.

No ca. sa.

The bail may plead in discharge of their liability, that there was no *capias ad satisfaciendum* (r) sued out and returned against the principal. But if the writ be merely irregular, or if it were sued out after a year, without a *scire facias* to revive the judgment, (s) or were made returnable on a day out of term, (t) or had not lain four days in the sheriff's office before its return, (u) the bail cannot take advantage of the irregularity, by pleading it, though it may be made the subject of an application to the court. (x)

Death of  
principal.

As the death of the principal, before the return of *capias ad satisfaciendum*, (y) will exonerate the bail from the performance of the condition of the recognizance, they may plead it in their discharge. But they cannot

(p) 1 Saund. 38. a. 2 id. 344. See *Solomons v. Lyon*, 1 East, 369.

(q) 1 Saund. 92. n. 3. Com. Dig. Pleader, 2 W. 13. *Coy v. Hymas*, 2 Stra. 1171. This plea should be delivered to the plaintiff's attorney, and not filed; and if it be the only one, need not be signed by counsel, 1 Tidd, 699. 7th ed.

(r) See Form, Petersdorff's Index to Precedents, tit. Recognizance.

(s) *Cholmondeley v. Bealing*, 2 Ld. Raym. 1096. Holt's Rep. 90. 6 Mod. 304. s. c.

(t) *Campbell v. Cumming*, 2 Burr. 1187.

(u) *Cherry v. Powell*, 1 D. & R. 50.

(x) Ante, p. 359.; and see *Hayward v. Ribbans*, 4 East, 309. *Dudlow v. Watchorn*, 16 id. 39.

(y) Precedents, Clift. 188. 7 Went. 77. See 2 Ld. Raym. 1256. Morg. 545. 1 Wils. 334. 4 T. R. 587. 2 East, 312.

plead that the principal died before the issuing (z) or after the return (a) of the *capias ad satisfaciendum*, for though a plea that the principal died before the writ issued, be conclusive, if found for the defendant, yet it is not so if found for the plaintiff, inasmuch as the principal might still have died after the issuing, and before the return of the writ.

Of the  
pleadings;  
Death of  
principal.

The render of the principal, at any time pending the suit, or before the return of the *capias ad satisfaciendum*, may be pleaded; (b) but if it be not effected till after the return, it cannot be pleaded, although the bail may be entitled to the full benefit of it upon motion. (c)

Render of  
principal.

Payment by, (d) or a release to, the principal or bail, may be pleaded by the latter; but they cannot avail themselves of the bankruptcy and certificate of the principal by pleading it in their discharge; as their claim to relief on that ground is founded rather upon the equitable jurisdiction of the court, than upon any strict legal defence: (f) though, in instances where the very merits of the case depend upon the established practice of the court, it is pleadable. (g)

Payment,  
&c.

The bail, it would appear, may plead that a writ of error was sued out and allowed after the issuing, and

Writ of  
error.

(z) *Weddall v. Jocar*, 10 Mod. 268. 303.

(a) *Glynn v. Yates*, 8 Mod. 31. 1 Stra. 511. s. c. *Parry v. Berry*, 2 Ld. Raym. 1452. 2 Stra. 717. s. c. *Rawlinson v. Gunston*, 6 T. R. 284. 2 Saund. 72. a.

(b) *Wilmore v. Clerk*, 1 Ld. Raym. 156. *Healey v. Medley*, M. 24 Geo. 3. K. B. See Precedent, 1 Bro. Ent. 178.

(c) *Wilmore v. Clerk*, 1 Ld. Raym. 156. Anon. 1 Salk. 101.

(d) 4 Anne, c. 16. s. 12.

(f) *Donnelly v. Dunn*, 1 B. & P. 448. s. c. 2 id. 45. *Beddome v. Holbrooke*, 1 B. & P. 450. n. See *Scholey v. Mearns*, 7 East, 153. *Walmesley v. Macey*, 5 B. Moore, 168. *Ball v. Swan*, 1 B. & A. 393. 15 East, 622.

(g) *Dudlow v. Watchorn*, 16 East, 39 Sed vide *Cherry v. Powell*, 1 D. & R. 50.

Of the  
pleading.

Replication  
to *nul tiel*  
record.

before the return of the *capias ad satisfaciendum* against the principal. (h)

To a plea of *nul tiel record*, the replication must re-assert the existence of the record, and conclude *prout patet per recordum*, with a prayer that it may be seen and inspected by the court. (i)

To no *ca. sa.*

If the bail have pleaded no *ca. sa.* against the principal, the replication must set forth, and the writ generally concludes with a verification ; (k) and, where the replication to a similar plea set out the writ, and concluded with a verification by the record, and a prayer, that the record might be inspected by the court, it was holden valid, though no formal issue had been joined. (l) When it does not appear that the *ca. sa.* issued into the county where the venue in the original action was laid, the defendant may traverse the allegation or rejoin the fact. (m)

Death of  
principal.

If the death of the principal, before the return of the *ca. sa.* has been pleaded, the writ and return must be replied, and it must be averred that the principal was then living. (n)

Render or  
payment.

The replication to a plea of render or payment, must negative the allegation, and conclude to the country.

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### SECTION III.

#### OF THE EVIDENCE, JUDGMENT, AND EXECUTION.

THE mode of establishing, or negating the issue of *nul tiel record*, has been so fully described and pointed

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(h) *Sampson v. Brown*, 2 East, 439

(i) 1 Saund. 92, 93. 5 Com. Dig. tit. Pleader, 2 W. 13. 2 Marsh, 354.; and for forms, see Petersdorff's Index, tit. *Nul tiel Record*.

(k) *Henderson v. Withy*, 2 T. R. 576.

(l) *Jackson v. Wickes*, 2 Marshall, 354. 7 Taunt. 30.

(m) *Dudlow v. Watchorn*, 16 East, 39.

(n) *Wilson v. Hodges*, 2 East, 313. For forms, see Petersdorff's Index to Precedents, tit. Recognizance.

out in the different works on the practice of the courts; that it will be here sufficient to refer to them in a note. (o)

Of the  
evidence,  
judgment,  
and execu-  
tion.

When issue has been joined upon the plea of no *capias ad satisfaciendum* against the principal, the writ and sheriff's return should be proved by an examined copy of the writ from the record, as the best proof of which the nature of the case is capable. (p)

It being a general rule of evidence that the burden of proof lies on the person who has to support his case by evidence of a fact, of which he is supposed to be cognizant; when the issue is upon the life or death of the principal; the onus of establishing that fact lies upon the bail who assert the death, for it is presumed that the party continues to live, until the contrary is satisfactorily shewn. (q)

Judgment must be signed, and the costs taxed as in ordinary cases. Judgment.

If the proceedings were against both the bail, or the bail and principal jointly, the process of execution must of course pursue the judgment, and be warranted by it. It appears at one period to have been thought necessary, that a *fi. fa.* and return of *nulla bona* should be obtained before suing out a *ca. sa.* against the bail; but this conjecture is not supported by authorities, and it is now clear that the execution may be by *fieri facias*, *elegit*, *levari facias* or *capias ad satisfaciendum*, at the election of the plaintiff; (r) Execution.

(o) 2 Tidd. 781. 7th ed. 2 Archbold's Prac. K. B. 38. Imp. K. B. 301. Imp. C. P. 340.

(p) Bul. N. P. 234. 2 Bac. Ab. Evidence, H. Edmonstone v Plaisted, 4 Esp. 160. Ramsbottom v. Buckhurst, 2 M. & S. 565.

(q) Wilson v. Hodges, 2 East, 312. See Doe dem. George v. Jesson, 6 East, 80. 85. Hopewell v. De Pinna, 2 Campb. 115. Doe dem. Lloyd v. Deakin, 4 B. & A. 433.

(r) Anon Lofft, 238. Regault v. Canilk, 1 Rol. Ab. 897. Paine v. Puttenham's Dy. 306. Elliott v. Smith, 2 Stra. 1139. Goodchild v. Chaworth, id. 822. Anon. 3 Salk. 158. Gee v. Fane, 1 Lev. 225. Baskerville v. Brocket, Cro. Jac. 450.

Of the  
evidence,  
judgment,  
and execu-  
tion.

Execution.

and if the amount of his debt be not satisfied by the execution, against the effects of the bail, the plaintiff may have recourse to his remedy against the principal. (s)

But a plaintiff cannot have execution against both the person of the bail and the principal. By taking the bail under a *ca. sa.*, the principal is for ever discharged; and being exonerated, no subsequent event can revive his liability, even although the bail become bankrupt, and are discharged by their certificates, or released from custody on part payment of the debt, under an express agreement that the plaintiffs should be at liberty to proceed against the principal for the recovery of the residue. (t)

The circumstance of one of several bail being charged in execution, does not divest the others of their liability. (u)

Where a plaintiff, acting under what he conceived to be sound and proper advice, took the principal in execution after he had arrested the bail on a *ca. sa.*, he was holden not to be liable to an action for maliciously arresting the defendant, although, previous to the arrest, he had had notice from the defendant that his proceedings were illegal. (x)

(s) *Felgate v. Mole*, 1 Sid. 9. *Higgen's case*, Cro. Jac. 320. *Baskerville v. Bocket*, id. 450. 10 Vin. Ab. 578. Execution.

(t) *Allen v. Snow*, 2 M. & S. 341. *Higgen's case*, Cro. Jac. 320. Anon. 3 Salk. 158. Com. Dig. Execution.

(u) *Higgen's case*, Cro. Jac. 320.

(x) *Snow v. Allen*, 1 Stark. 502.

## CHAPTER XIII.

## OF THE PROCEEDINGS AGAINST BAIL, ON THEIR RECOGNIZANCE, BY SCIRE FACIAS.

## SECTION I.

## OF THE PROCEEDINGS BEFORE DECLARATION.

WHEN the bail are not resident within the jurisdiction of the court, or from other causes are incapable of being served with process; or where it is not expedient that they should be apprized of the intended proceedings against them, the remedy by *scire facias* is preferable to an action of debt; but in all other instances, the latter, it has been shewn, is the more eligible mode of proceeding.

A *scire facias* is a judicial writ, founded upon the recognizance, requiring the person against whom it is brought, to shew cause why the party suing should not have the benefit of the recognizance; and although denominated a judicial writ, is in effect an action, as the defendant may plead to it, and every species of process to which a defendant may plead, whether judicial or original, is in law an action. (a)

Nature of  
the writ.

This writ should be sued out of the court in which the original action was depending, (b) and commence by stating the recognizance, after which the judgment is set

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(a) Litt. sect. 505, 506. Co. Litt. 290. (b) 291. (c) D. & S. 330. O'Brian v. Ram, 3 Mod. 189. Winton v. Kritchman, Skin, 682. Grey v. Jones, 2 Bl. Rep. 1227. Pulteney v. Townson, 2 Blk. 1227. (b) Guillam v. Hardisty, 3 Salk. 320. s. c. 1 Ld. Raym. 216.

Of the proceedings before declaration.

Nature of the writ.

forth *prout patet per recordum*. The writ then alleges, that the principal has not paid the debt or damages recovered against him, nor rendered himself to the prison of the Marshal (c) or Warden. In the King's Bench, it concludes by requiring the sheriff to make known to the bail, that they be before the King at Westminster, on a day certain, (or if by bill or by original, on a general return-day wheresoever, &c.) to shew if they have, or know of any thing to say for themselves, why the plaintiff ought not to have his execution against them for the debt or damages, (or if by bill or by original, for the sum acknowledged) according to the form and effect of the recognizance, if it shall seem expedient for him so to do; and further, to do and receive what the court shall then and there consider proper to be done in their behalf.

In the Common Pleas, bail are required by the writ to be before the King's Justices at Westminster, on a general return-day, to shew, &c. why the penalty of the recognizance should not be levied.

In the Exchequer, the *scire facias* is similar to the writ in actions commenced by bill in the King's Bench, and commands the bail to be before the barons on a certain day therein mentioned.

When issuable.

The *scire facias* in the King's Bench, in actions by bill, may be sued out on the return-day of the *capias ad satisfaciendum*, or in actions by original in that court, or in the Common Pleas, on the *quarto die post* of the process against the principal. (d)

One *scire facias* is in all cases sufficient. The recog-

(c) *Snow v. Firebrass*, 2 Salk. 439. s. c. 3 id. 320. s. c. 2 Ld. Raym. 804. The Marshal of the King is the Marshal of the King's Bench, and no other person can be understood by it, per Holt, C. J. id.

(d) *Stewart v. Smith*, 2 Ld. Raym. 1567. Stra. 866. s. c. *Hunt v. Coxe*, 3 Burr. 1360. 1 Bl. Rep. 393. s. c.



nizance upon which the writ is founded being joint and several, and the judgment being to have execution according to the form and effect of the recognizance, it follows as a necessary consequence, that although the *sci. fa.* may be joint, the execution may be several. (e) But a *scire facias* issued against three, upon a recognizance entered into by four, was abated, because no reason was suggested, such as the death of the fourth conusor, for this variance between the writ and the record. (f)

Of the proceedings before declaration.

*Sci. fa.* may be joint or several.

It has been conceived that the *scire facias* against the principal should be *in hac parte*, or that he do and receive what the court shall consider of him in *this* behalf; and that against the bail it should be *in ea parte*, or that they do and receive what the court shall consider of them in *that* behalf; (g) but these distinctions appear no longer to exist, and that *in hac parte* would be proper in either case. (h)

No distinction whether against the principal or bail.

As the recognizance of bail in the Court of King's Bench is not obligatory by the caption, but by its being entered of record, and as it is invariably enrolled as taken in court, though actually entered into before a judge at chambers or a commissioner, (i) the *scire facias* must be directed to the sheriff of Middlesex, or where the recognizance is recorded, notwithstanding the action against the principal may have been by original, and the proceedings thereon in another county. (k) But in the Common Pleas, as the recognizance is a record immediately

Into what county issuable.

(e) 2 Bac. Ab. Execution, 359. *Gee v. Fane*, 1 Lev. 225, 226. 1 Sid. 359. s. c. See *Rex v. Chapman*, 3 Anstr. 311. *Rex v. Young*, 2 id. 448.

(f) *Aleyn*, 41. See *Piper v. Thompson*, Bunb. 229. *Wilkinson v. Thorley*, 4 M. & S. 33. *Hartley v. Hodson*, 2 B. Moore, 66.

(g) *Lug v. Goodwin*, 1 Ld. Raym. 393. 2 Salk. 599. s. c. *Atwood v. Burr*, 7 Mod. 4. *Piper v. Thompson*, Bunb. 228.

(h) *Bringar v. Allanson*, 1 Ld. Raym. 532.

(i) *Shuttle v. Wood*, 2 Salk. 564. s. c. 2 Ld. Raym. 966. 6 Mod. 42. s. c. Holt's Rep. 612. s. c. *Bond v. Isaac*, 1 Burr. 409. In *Harris v. Calvert*, 1 East, 603, where bail, in an action by original, had been put in in a different county to that in which the original issued; a *sci. fa.* against them in the former county was holden irregular.

(k) *Coxeter v. Burke*, 2 Smith, 14. 5 East, 461.

Of the proceedings before declaration.

Into what county issuable.

How tested.

When returnable.

Mode of suing it out.

upon the caption, and binds the lands of the consors before it is filed at Westminster, the *scire facias* may be brought either in Middlesex, where the record is, or when taken before a judge at chambers or a commissioner, it may be sued out in the county where it was actually acknowledged. (l)

Where the original action has been commenced by bill in the King's Bench, the *scire facias* ought to be tested on the return-day (m) of the *capias ad satisfaciendum* against the principal; or if the action were by original, or in the Common Pleas, it should be tested on the *quarto die post* of the *ca. sa.* (n)

In the King's Bench, in actions by bill, the *scire facias* must be made returnable before the King at Westminster, on a day certain; (o) and if only one writ is intended to be sued out, there need only be an interval of four days *exclusive*, between the teste and return of it. (p) But if the action were by *original*, there ought to be fifteen days *inclusive*, between the teste and return, (q) and it should in that case be made returnable on a general return-day wheresoever we shall then be in England. (r)

In the Common Pleas the *scire facias* should be made returnable before the King's Justices at Westminster on a general return day; and when there is but one writ, there should regularly be fifteen days between the teste and return.

The *scire facias* in the King's Bench is prepared by the plaintiff's attorney; and in actions by *bill*, is signed by

(l) Hall v. Winckfield, Hob. 195. Brownl. 69. Moor, 883. s. c. Cock v. Green, Ca. Prac. C. P. 31. Shuttle v. Wood, 2 Salk. 564. 6 Mod. 42. s. c. Holt, Rep. 612. s. c. Andrew's case, Sty. 9. 2 Lutw. 1287. Pickering v. Thomson, Barnes, 207. Keny v. Thornton, 2 Bl. Rep. 768. Hartley v. Hodson, 8 Taunt. 171. 2 B. Moore, 66. s. c. 2 Saund. 72. n.

(m) Stewart v. Smith, 2 Ld. Raym. 1567. 8 Stra. 806. 8 Taunt. 171.

(n) Id. Impety, C. P. 492. 6th ed.

(o) Eden v. Wills, 2 Raym. 1417. 1 Stra. 694.

(p) Bell v. Jackson, 4 T. R. 663. vide post.

(q) R. T. 8 W. 3 reg. 1. 5 Geo. 2 reg. 3 K. B.

(r) Adams v. Savage, 3 Salk. 381. 2 Ld. Raym. 854. s. c.

the signer of the writs ; but in actions by *original*, it is signed by the filacer. In the Common Pleas, where there are two writs of *scire facias*, the first is made out and signed by the filacer ; but the second is prepared by the plaintiff's attorney, and signed by the prothonotary. (s)

Of the pro-  
ceedings be-  
fore decla-  
ration.

Mode of  
suing it out.

After the writ of *scire facias* has been sued out, it ought to be delivered to the sberiff; and if the defendants reside within the county into which it issued, the plaintiff (though not usual in practice) ought in strictness to cause them to be summoned. (t) This is effected by requiring the officer to whom the process was delivered, to serve the parties with a copy of the sheriff's warrant, which recites the writ of *scire facias*. Such notice may be served at any time before the return of the *scire facias*, or even upon the return-day, provided it be before the rising of the court. (u) When the bail are resident in another county, as the summons must be served in Middlesex, this mode of proceeding, by giving the bail notice, cannot of course be adopted.

Delivering  
*sci. fa.* to  
sheriff, and  
summons  
thereon.

Every writ of *scire facias*, of which notice is to be delivered to the defendant, should be left in the sheriff's office four days exclusive, before the return. (x)

On the return-day of the *scire facias* by bill or on the *quarto die post* of the return by original in the King's Bench (y) or Common Pleas, (z) the sheriff may be re-

Return to  
the *sci. fa.*

(s) *Follett v. Trill*, Barnes, 96.

(t) *Wright v. Page*, 2 Bl. Rep. 837. *Barr v. Satchwell*, 2 Stra. 813. *Hunt v. Coxe*, 3 Burr. 1360. 1 Bl. Rep. 393. s. c.

(u) *O'Brian v. Frazier*, 1 Stra. 644. *Webb v. Harvey*, 2 T. R. 757. *Clarke v. Bradshaw*, 1 East, 86. See *Wright v. Page*, 2 Bl. Rep. 837. *Barr v. Satchwell*, 2 Stra. 813.

(x) R. E. 5 Geo. 2. s. 3. *Forty v. Hermer*, 4 T. R. 483. *Millar v. Yerraway*, 3 Burr. 1723. *Gross v. Nash*, 4 id. 2439. *Clarke v. Bradshaw*, 1 East, 86. *Hayward v. Rennard*, 3 East, 570. *Dicas v. Perry*, 2 D. & R. 869.

(y) *Sharp v. Clark*, 13 East, 391.

(z) *Imp. C. P.* 6th ed. 487.

Of the proceedings before declaration.

Return to the *sci. fa.*

quired to return the writ; when he either returns *scire feci*, that is, that he has given notice to the defendant, or *nihil*, that he has nothing by which he can warn or make known to him.

To authorize the sheriff to make a return of *scire feci*, the defendant ought regularly to have been served with a copy of the writ, or at least some previous notice of the proceeding should have been communicated to him, (a) the sufficiency of which, if disputed, must be determined by the court on a review of the circumstances; (b) though, in general, where *scire feci* is returned by the sheriff, the court will not inquire into the validity of the summons on a summary application, but will leave the party to his remedy by action against the sheriff for a false return. (c)

*Alias sci. fa.*

When the sheriff returns *nihil*, the plaintiff in the King's Bench must sue out a second or *alias* writ of *scire facias*, commanding the sheriff, as before he was commanded, &c. (d) And if, upon the second writ, the sheriff also return *nihil*, the plaintiff will be entitled to judgment, (e) two *nihils* being considered equivalent to a return of *scire feci*. (f)

*Alias sci. fa.*  
how tested.

The second or *alias* writ of *scire facias* should be tested on the return-day in actions by bill, or in actions by original in the King's Bench or Common Pleas on the *quarto*

(a) Barr v. Satchwell, 2 Stra. 813. Wright v. Page, 2 Bl. Rep. 837. Hunt v. Coxe, 3 Burr. 1360. 1 Bl. Rep. 393. s. c.

(b) Wright v. Page, 2 Bl. Rep. 837.

(c) Burr v. Satchwell, 2 Stra. 813. Hart v. Coxe, 3 Burr. 1360, 1361. 1 Bl. Rep. 393. s. c.

(d) 4 Inst. 472. Randal v. Wale, Cro. Jac. 59. Andrews v. Harper, 8 Mod. 227.

(e) Barret v. Cleydon, 2 Dy. 168.

(f) Barret v. Cleydon, 2 Dy. 168. Bromley v. Littleton, Yelv. 113. Bascock v. Tompson, Sty. 281. 288. 323. Clarke v. Bradshaw, 1 East, 86. Hayward v. Ribbans, 4 East, 310.

*die post* of the return of the first *sci. fa.*, unless that day happen to be a Sunday. (g)

Of the proceedings before declaration.

*Alias fi. fa.* when returnable.

The *alias* must be made returnable on a day certain or general return-day, according to the nature of the previous proceedings. In the King's Bench, in actions by *original*, there must be fifteen days inclusive, between the *teste* and return of the *alias sci. fa.*, as well as the first writ of *scire facias*. (h) But if the proceedings were by bill, it is sufficient if there be fifteen days inclusive, between the *teste* of the first, and return of the second writ, without regard to the number of days between the *teste* and return of each. (i)

In the Common Pleas it is not necessary that there should be fifteen days between the *teste* and return of each *scire facias*, it is sufficient if there be fifteen days between the *teste* of the first, and return of the second. (k)

It was anciently the practice in the Court of King's Bench to sue out both the writs of *scire facias* together, by making the *teste* of the second, as if the first had been actually returned; but a rule has since been made, prohibiting the continuance of this practice, and ordering, that the first writ shall be duly returned before the second is sued out, and that the second shall be tested the day of the return of the first. (l)

*Alias sci. fa.* how sued out.

In the Common Pleas, a rule is given to the prothonotaries on the return of the first *scire facias* for another writ to issue.

(g) *Barret v. Cleydon*, 2 Dy. 168. (a) There is, however, in general, no difference between Sunday and any other day as to the *return* of a writ. *Fano v. Coken* 1 H. Bl. 9. (h) R.E. 5 Geo. 2. reg. 3. a.

(i) R. T. 8 W. R. E. 5 Geo. 2. reg. 3. Anon. 2 Salk. 599. *Hicks v. Jones*, 2 Stra. 765. *Elliott v. Smith*, id. 1139. Anon. 7 Mod. 40. *Andrews v. Harper*, 8 id. 227.

(k) *Price v. Lewis*, Ca. Prac. C. P. 114. s. c. Pr. Reg. C. P. 377. *Peale v. Watson*, 2 Bl. Rep. 922.

(l) R. T. 8 W. 3. K. B. Anon. 2 Salk. 599. *Andrews v. Harper*, 8 Mod. 227. *Atwood v. Burr*, 7 Mod. 3 Anon. id. 40. Anon. 12. id. 87.

Of the proceedings before declaration.

Delivery of *alias sci. fa.* to sheriff.

It being the duty of the bail to search the sheriff's office, it is not necessary that they should be apprized of the proceedings, when a *scire facias* and *alias* are intended to be issued, and respectively returned *nihil*. (m) The first *sci. fa.* should be left at the sheriff's office, one or two days (n) before it is returnable, and the sheriff requested to make a return of *nihil*. On the return of *nihil* being obtained, the *alias* should be sued out and left at the office four days, which must be the last four days, (o) exclusive of the day on which it is lodged, and of the return-day, and of any Sunday that may intervene. (p) It is sufficient, however, to authorize proceedings against the bail, if the second writ of *sci. fa.* be on the file in the sheriff's office for the time prescribed, though it is not entered in the *scire facias* book, that being merely a private register, kept for the convenience of the sheriff himself. And if the plaintiff has regularly conformed to what is required to be done by him, in bringing in the writ to the office, and letting it lie there the allotted period, no omission of the sheriff can make the party guilty of an irregularity. (q)

The sheriff, by a rule of court, is ordered to endorse on each writ the day of the month it is left in his office.

Of the rule to appear.

On the day the *scire facias* is returnable, a rule should be given for the defendant to appear. In the King's Bench, it should be given with the clerk of the rules on the return-day in actions by *bill*, or in actions by *original*, on

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(m) *Sillitoe v. Wallace*, M. T. 43 Geo. 3. K. B. cited Tidd, 1162. 7th ed. *Clarke v. Bradshaw*, 1 East, 89.

(n) R. E. 5 Geo. 2 reg. 8. See *Millar v. Yerraway*, 3 Burr. 1723. *Gross v. Nash*, 4 id. 2440. *Williams v. Mason*, 1 East, 89. n. a. Imp. K. B. 531. 8th ed.

(o) *Forty v. Hermer*, 4 T. R. 583. *Cock v. Brockhurst*, 13 East, 588.

(p) *Dicas v. Perry*, 2 D. & R. 869. See *Howard v. Smith*, 1 B. & A. 529.

(q) *Heyward v. Rennard*, 3 East, 570.

the *quarto die post* of the return of the second *scire facias*, or of the first, if *scire feci* be returned. (r) This rule expires in four days exclusive, and a Sunday or holyday, though an intermediate day, is not included in the computation. (s)

Of the proceedings before declaration.

Of the rule to appear.

The rule to appear in the Common Pleas is left with the prothonotaries, (t) and, as in the King's Bench, expires in four days exclusive; (u) and where *scire feci* is returned, it should be given on the appearance-day of the return of the writ; but where there are two writs of *scire facias*, it is laid down that the rule should be given on the *return-day* of the last writ. (x)

On the expiration of the time limited by the rule, if the defendant does not duly appear, the plaintiff is entitled to an award of execution, (y) and judgment may be immediately signed.

Judgment by default.

After judgment has been signed, the proceedings in *scire facias* should be entered on a roll, and execution awarded. (z) When two writs issue in the King's Bench, returnable in different terms, the first ought to be entered of the term wherein it is returnable, and an award of the second is sufficient without setting the whole of it out at length; (a) but in the Common Pleas, if there be two writs of *scire facias* returnable in different terms, there must be two rolls, one of the term the first writ was returnable, and the other of the term the second is returnable, on one of which rolls the first writ is entered, with

Entry on the roll.

(r) *Sharp v. Clark*, 13 East, 391.

(s) *Wathen v. Beaumont*, 11 East, 271. *Howard v. Smith*, 1 B. & A. 529. *Dicas v. Perry*, 2 D. & R. 869.

(t) *Imp. C. P.* 6th ed. 487.

(u) *Id.* 488.

(x) *Id.* 487.

(y) *Phillipson v. Mangles*, 11 East, 516. *Com. Dig. Pleader*, 3 L. 8, 9.

(z) See Forms referred to in 2 Saund. 72. n.

(a) R. E. 5 Geo. 2. reg. 3. K. B.

Of the proceedings before declaration.

Judgment by default.

the sheriff's return thereto, and an award of the second writ only; and the other roll, which begins with an *alias prout patet* contains a copy of the former roll, with the addition of the return of the second writ, and the entry of the judgment of the court. (b)

When a *scire facias* has been issued to have execution on a recognizance against two; if one be returned summoned, and *nihil* be returned as to the other, or that the latter is dead, and the one summoned make default, the plaintiff may have execution for the whole against the survivor. (c)

The proceedings by *sci. fa.* where two *nihils* are returned, are in some respects unfavourable to the defendant, and would in many instances be productive of injustice, if the award of execution consequent upon the judgment were allowed to be final and conclusive.

But these apparent objections are obviated by the court uniformly interposing its summary jurisdiction to enable the defendant, either on motion in term, or by an application to a judge at chambers, in vacation, to avail himself of any defence which he might have pleaded to the *sci. fa.*, if he had been aware of the proceedings instituted against him by the plaintiff; (d) yet where judgment had been signed, and execution issued, the court refused to set them aside for irregularity, on the ground that the bail, though resident in Middlesex, had not been apprized of the proceedings. (e)

(b) See *Phillipson v. Mangles*, 11 East, 516.

(c) Roll, Abr. 890. (s) pl. 1.

(d) Anon. 1 Salk. 63. *Lampton v. Collingwood*, id. 262. 4 Mod. 314. s. c. Carth, 282. Comb. 325. Holt, 270. 1 Ld. Raym. 27. s. c. *Wipel v. Creamer*, Salk. 264. 1 Ld. Raym, 439. s. c. *Dodd v. Beckman*, 1 Ld. Raym. 445. *Wharton v. Richardson*, 2 Stra. 1075. *Ludlow v. Lennard*, 2 Ld. Raym. 1295. *Wright v. Page*, 2 Bl. Rep. 837.

(e) *Smith v. Crane*, MS. C. P. 1823.



If, however, the defendant have been summoned, and he neglect to appear and plead, he is for ever after precluded from availing himself of any matter which would otherwise have operated as a discharge. (*f*)

Of the proceedings before declaration.

It has been laid down(*h*) as a general proposition, that a *scire facias* is not amendable, and that, if it be defective in the *teste* (*i*) or return, (*k*) or vary from the record, the plaintiff must move to quash it; (*l*) but this rule has not been universally adopted. (*m*) The courts exercise a discretionary power, although, in exerting this authority, it appears they will not aid any irregularity, of which the bail might be fairly entitled to avail themselves; (*n*) and therefore, where it can be shewn that the amendment would deprive the bail of the advantage of surrendering the principal, the motion will be refused. (*o*)

Amendment of *scire facias*.

In the King's Bench, when expense has been incurred by the defendant, in consequence of an error committed by the plaintiff, the writ of *sci. fa.* can only be quashed on payment of costs. (*p*) But in the Common Pleas, where upon a motion by the plaintiff to quash his writ of *sci. fa.*, the defendant insisted upon costs, alleging, that he had

Quashing of *sci. fa.*

(*f*) F. N. B. 104. Anon. 1 Salk. 93. 1 Wils. 98. 2 Ld. Raym. 1295. Stra. 1075. 2 Bl. Rep. 1183.

(*h*) See cases, 2 Saund. 72. n.

(*i*) Hillier v. Frost, 1 Stra. 401.

(*k*) Id.

(*l*) 8 Co. 161. Villars v. Parry, 1 Ld. Raym. 182. 547. Comb. 397. s. e. Vavasor v. Baile, 1 Salk. 52. Hillier v. Frost, 1 Stra. 401. Baynes v. Forrest, 2 Stra. 892. Grey v. Jefferson, id. 1165. Hodgson v. Michell, Barnes, 26. 114. s. c. Fulwood v. Annis, 3 B. & P. 321.

(*m*) See 2 Saund. 72. Bucksome v. Hoskin, 2 Ld. Raym. 1057. 6 Mod. 263. 310. s. c. Sweetland v. Beezley, Barnes, 4. Perkins v. Petit, 2 B. & P. 275. Braswell v. Jeco, 9 East, 316. Stevenson v. Grant, 2 N. R. 103. Mann v. Calow, 1 Taunt. 222. See Marsh v. Blachford, 1 Chit. Rep. 323. The King v. Scott, 4 Price, 181.

(*n*) Fulwood v. Annis, 3 B. & P. 321. Perkins v. Petit, 2 B. & P. 275. Hodgson v. Michell, Barnes, 26, 27. Christie v. Walker, 1 Bing. 206.

(*o*) Hodgson v. Michell, Barnes 26, 27. Grey v. Jefferson, 2 Stra. 1165. 2 Saund. 72. n. Mann v. Calow, 1 Taunt. 223.

(*p*) Pickman v. Robson, 1 B. & A. 486. Pocklington v. Peck, 1 Stra. 638.

Of the proceedings before declaration.

Quashing of *sci. fa.*

entered an appearance, and thereby incurred expense, it was determined that costs were never recoverable in proceedings upon a *scire facias*, until a declaration was delivered, and the defendant had appeared and pleaded. (q) In *Pocklington v. Peck*, (r) the application of the plaintiff for leave to quash a writ of *sci. fa.*, after the defendant had pleaded in abatement, was granted, without costs, the court observing that the practice is the same in *sci. fa.* as in other actions where the defendant pleads in abatement, and the plaintiff should pay no costs.

Appearance.

If the bail in the King's Bench purpose to appear and plead to the *sci. fa.*, and the proceedings in the original action were by bill, a written notice of that intention, without filing common bail, will suffice. But if the action were by original, an appearance should regularly be entered with the filacer. In the Common Pleas, the appearance is entered on a *præcipe* with the prothonotaries.

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## SECTION II.

### OF THE PLEADINGS.

Declaration, venue.

THE venue, for the reasons already stated, (s) must be laid in Middlesex.

How entitled.

The declaration may be entitled generally of the term, though the *scire facias* may not have been returnable till

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(q) *Poole v. Broadfield*, Barnes, 431. Ca. Pr. C. P. 109. s. c. *Huer v. Whitehead*, Ca. Prac. C. P. 74. Prac. Reg. 378. s. c.

(r) 1 Stra. 638.

(s) Ante, p. 373. 374.

the last return of the term. (*t*) It commences by alleging, that the King sent to the sheriff his writ close, in these words, &c. and the *scire facias* is then set forth *verbatim*. The plaintiff's appearance at the return of the writ, and the sheriff's return thereto is next stated; and if the sheriff has returned *nihil*, it contains a recital of the mandatory part of the second writ of *scire facias*, and it then proceeds to state the appearance of the bail, and in actions by bill in the King's Bench, concludes by praying execution of the debt and damages, or in the Common Pleas, or by original in the King's Bench, of the sum acknowledged by the defendants, according to the form and effect of the recognizance.

Of the  
pleadings.  
General  
form of de-  
claration.

In an action by original there is no incongruity in stating that the recognizance was taken in an action, "then lately commenced and depending in the King's Bench," for the action may be said to commence in this court, when its jurisdiction attaches upon the original writ sued out of Chancery. (*u*)

Commence-  
ment of the  
original ac-  
tion.

It must be averred, in positive terms, that the recognizance is a record. (*x*)

Averting  
the recog-  
nizance to  
be of record.  
Breach of  
the recog-  
nizance.

Where, in an action against two, a recognizance of bail was given, "in case the said C. and D. should happen to be condemned, and should not pay or render themselves;" and a *scire facias* thereon, after shewing that C. was condemned, but not D., assigned a breach that C. and D. did not pay, nor render, &c.; it was holden that the breach, though in the words of the recognizance, was

(*t*) *Ward v. Gansell*, 3 Wils. 154. 2 Bl. Rep. 735. But see *Stevenson v. Grant*, 2 N. R. 103. when the declaration was demurred to on this ground, and afterwards amended. And see 1 T. R. 116. 5 id. 325. 8 id. 643. 4 East, 75. 1 Chit. on Pleading. 261. 3d ed. *Hartley v. Hodgson*, 2 B. Moore, 66, 8 Taunt. 171. s. c.

(*u*) *Mayo v. Rogers*, 14 East, 539. See *Phillipson v. Mangles*, 11 East, 516.

(*x*) *Stevenson v. Grant*, 2 N. R. 103.

Of the  
pleadings.

defective; since, with that allegation, it was quite consistent that C. had paid, or had rendered himself, which would have satisfied the recognizance, and as D. was not condemned, he was not bound either to pay or to render. (y)

Damages.

No damages should be stated at the end of the declaration, though the mistake, it seems, may be amended, even after a writ of error has been brought. (yy)

Rule to  
plead.

After the declaration has been delivered, the defendant should be ruled to plead, and a plea demanded in the same manner as in other cases, excepting that Sunday, or a *dies non*, is not included in the computation of the four days allowed by the rule, even when it is the last of the four. (z)

Pleas.

The defendant may plead either in bar, or in abatement, (a) and any defence which would be proper in an action of debt, may be pleaded to the *scire facias*. Thus the bail may plead *nul tiel* record of the recognizance; (b) payment by, (c) or a release to the principal or bail, (d) or that the principal rendered himself, or was rendered by his bail, before the return of the *ca. sa.*; (e) or that there was no *ca. sa.* sued out and returned against the principal, (f) or that the principal died before the return of the *ca. sa.*, (g) or that a writ of error has been sued out and allowed after the issuing, and before the return of the *ca. sa.*, (h) or that the plaintiff has become bankrupt; (hh) but the bail cannot plead that the principal died before the issuing, or after the return of the *ca. sa.* (i) or matters unconnected with the merits of the cause, and only founded on the practice of the courts. (ii)

(y) *Wilkinson v. Thorley*, 4 M. & S. 33.

(yy) *Hardy v. Cathcart*, 1 Marsh, 180.

(z) *Wathen v. Beaumont*, 11 East, 271.

(a) *Alice v. Gale*, 10 Mod. 112.

(b) Ante, p. 366.

(c) Ante, p. 367.

(d) Ante, p. 369.

(e) Ante, p. 367.

(f) Ante, p. 366.

(g) Ante, p. 366.

(h) Ante, p. 367.

(i) Ante, p. 366, 367. (hh) *Kinnear v. Tarrant*, 15 East, 622.

(ii) Ante, p. 259.

The appropriate replications to these pleas have been already stated. (k)

Of the  
pleadings.

Pleas.

All pleas and demurrers in *sci. fa.* must be delivered and not filed in the King's Bench ; though in the Common Pleas, the practice is in the alternative, as they may be either delivered to the plaintiff's attorney, or filed with the prothonotaries. The issue is made up by the attorney, and delivered to the opposite party ; or in country causes, by or to the agents in town ; and the other proceedings preparatory to going to trial are the same as in ordinary cases.

### SECTION III.

#### OF THE EVIDENCE AND SUBSEQUENT PROCEEDINGS.

THE evidence requisite to support or disaffirm the different issues, on writs of *sci. fa.*, is precisely the same as in an action of debt upon the recognizance.

An allegation in the pleadings with a *prout patet*, &c. that the plaintiff, by the judgment of the court, *recovered* against the bail, is not proved by the production of the recognizance of bail and the *scire facias* roll, which latter concluded in the common form that the plaintiffs have their execution thereupon against the bail ; for this is an *award of execution*, or at most a judgment of execution, and not a judgment to recover. (l)

The jury in finding either the affirmative or negative of the issue, cannot give damages for the delay of execution. (m)

Verdict.

(k) Ante, p. 368.

(l) Phillipson v. Mangles, 11 East, 516.

(m) 2 H. 6. 15. 1 Ro. Abr. 574. pl. 6. Henriques v. Dutch West India Company, 2 Ld. Raym. 1532. 2 Stra. 807 s. c. Knox v. Costello, 3 Burr. 1790.

Of the evidence and subsequent proceedings.

Verdict.

Where damages had been given by mistake, in a cause in the Court of Common Pleas, the plaintiff, upon a writ of error being brought, was permitted to enter a *remittitur* of the damages on the record, and the transcript was ordered to be made conformably thereto. (n)

Nonsuit.

The plaintiff on a writ of *sci. fa.* may be nonsuited. (o)

Judgment.

A rule for judgment must be entered, and at the expiration of the time limited by the rule, if the judgment be not arrested, or a new trial granted, the judgment is signed as in ordinary cases.

Costs.

As no damages can be recovered in a suit upon a writ of *sci. fa.*, no costs were granted previous to the statute of 8 & 9 W. 3. c. 11.; the third section of which enacts, "that in all suits upon any writ or writs of *scire facias*, the plaintiff obtaining judgment, or any award of execution, after plea *pleaded*, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fieri facias*, or *elegit*;" but it is provided (by s. 5.) that this statute shall not extend to executors or administrators. (p)

Execution.

After judgment against the principal, and award of execution against the bail, the plaintiff may sue out execution against either of them; and the recognizance being joint and several, the execution may be several, though the *sci. fa.* was joint. (q) And although one of the two bail be in execution, the plaintiff may take the other, (r) yet

(n) *Hady v. Cathcart*, 1 Marsh, 180.

(o) Bac. Ab. tit. Nonsuit, Y. B. 17 Ed. 3. 1. 45 Ed. 3. 16.

(p) *Bellew v. Aylmer*, 1 Stra. 188. *Scamanell v. Wilkinson*, 8 East, 202.

(q) *Gee v. Fane*, 1 Lev. 225. 1 Sid. 339. s. c.

(r) *Higgen's case*, Cro. Jac. 320.

the circumstance of having taken the principal in execution, it seems, would totally preclude the plaintiff from proceeding against the bail. (s)

Of the evidence and subsequent proceedings.

Execution.

In the King's Bench and Exchequer the execution may be by *fieri facias*, *elegit*, *levari facias*, or *cepius ad satisfaciendum*; and the last of the two writs may be taken out against the bail without any previous *fi. fa.* or return of *nulla bona*. (t) But in the Common Pleas a *ca. sa.* does not lie against the bail after an award of execution on a *sci. fa.*, but the plaintiff must proceed against their lands and chattels by *levari facias* or *elegit*, according to the terms of the recognizance. (u) Where the sheriff, having taken the bail on a *ca. sa.* after an award of execution on a *sci. fa.* discharged them, was sued for an escape, and was declared against in debt, with a count for money had and received, the Court of Common Pleas ordered the *cepius ad satisfaciendum* to be set aside, and the count for the escape to be struck out of the pleadings, the sheriff paying the costs of that count and of the declaration. (x)

Where a judgment on *scire facias* has been signed, and execution issued against the bail, the court will not set them aside on the ground of an alleged irregularity, that the bail, though resident in Middlesex, had no notice of the proceedings. (y)

Although a *scire facias* is in the nature of an action, and

Writ of error.

(s) *Higgins's case*, Cro. Jac. 320. *Astry v. Ballard*, 2 Lev. 195. Vent. 315. s. c. *Perkins v. Pettit*, 2 B. & P. 440. *Allen v. Snow*, 2 M. & S. 341.

(t) *Goodchild v. Chaworth*, 2 Stra. 822. *Elliott v. Smith*, id. 1139. 3 Salk. 158. Com. Dig. Execution.

(u) *Anon.* Litt. 288. *Regault v. Carrick*, 1 Ro. Ab. 897. 2 Danv. 498. s. c. *Paine v. Puttenham*, Dy. 306. *Gee v. Fane*, 1 Lev. 225. *Troughton v. Clarke*, 2 Taunt. 113. *Wooden v. Moxon*, 6 id. 490. 2 Marsh. 186. s. c. *Armstrong v. Fuller*, 1 Chit. Rep. 190.

(x) *Wooden v. Moxon*, 6 Taunt. 490. 2 Marsh. 186. s. c.

(y) *Smith v. Crane*, MS. E. T. C. P. 1823. See *Lowe v. Robins*, 1 B. & B. 381. 3 B. Moore, 757. s. c.

Of the evidence and subsequent proceedings.

Writ of error.

is in many respects an original proceeding, yet, on a judgment in the King's Bench, whether the action against the principal was commenced by original or by bill, a writ of error can only be brought in parliament; as the stat. of 27 Eliz. c. 8. in enumerating the different suits or actions intended to be included in its provisions, does not mention the writ of *scire facias*. (z)

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## CHAPTER XIV.

### WHEN AND IN WHAT CASES BAIL TO THE ACTION ARE DISCHARGED.

THE responsibility of the bail to the action, the general right of the plaintiff against them, and the manner in which their liability is to be enforced, having been already stated and discussed, it is proposed in the present chapter to examine, within what time, in what manner, and on what terms, they may be exonerated.

The right of the bail to be discharged may be occasioned by an act of God, by an act of law, or by an act of the parties.

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## SECTION I.

### BY AN ACT OF GOD.

By death of principal.

THE death of the principal at any stage of the proceedings, before the return of the *capias ad satisfaciendum* against the principal, discharges the bail; (a) but as they are in strictness fixed by the return of *non est inven-*

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(z) 4 Bac. Ab. 410. (a) m. Jones, 136.



*tus*, if the defendant die after the *ca. sa.* is returnable ; (b) though, while the writ remains unreturned in the sheriff's office, (c) the court will not relieve them.

By an act  
of God.

By death of  
principal.

Prior to a recent decision, where the principal died after the *ca. sa.* was returned, but before the return was filed, the courts, in favour of the bail, would suspend the filing of it ; (d) but it is now clearly established, that if the principal die after the return of the *ca. sa.*, and before the return is regularly filed, the bail are nevertheless fixed, and the court will not interpose. (e)

The bail may take advantage of the death of the principal, either by pleading it in bar, (f) or by applying to the court in term, or to a judge at chambers in vacation, for permission to enter an *exoneretur* on the bail-piece. This application must be founded on an affidavit, declaring the state of the cause, the death of the principal, and where the nature of the facts require it, negative any inference of that event having happened subsequent to the return of the *ca. sa.*

The courts, it has been already stated, will not discharge a defendant out of custody on the ground of insanity ; and for similar reasons they will not exonerate the bail on account of the derangement of their principal, although a commission of lunacy may have issued against him, under which he has been solemnly declared a lunatic. (g)

By insanity  
of principal.

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(b) *Parry v. Berry*, 2 *Ld. Raym.* 1452. 2 *Stra.* 717. s. c. *Glyn. v. Yates*, 1 *Stra.* 511.

(c) 2 *Sell.* 55.

(d) 2 *Crompt. Pr.* 88. 1 *Rich. Pr.* 445.

(e) *Rawlinson v. Gunston*, 6 *T. R.* 284.

(f) *Vide ante*, p. 360.

(g) *Kernol v. Norman*, 2 *T. R.* 390. *Nutt v. Verney*, 4 *id.* 121. *Ibbotson v. Lord Galway*, 6 *T. R.* 133. *Steel v. Alan*, 2 *B. & P.* 362. *Pillop v. Sexton*, 3 *B. & P.* 550. *Cock v. Bell*, 13 *East*, 355. *Anon. Loft*, 617. See *Cavenagh v. Collett*, 4 *B. & A.* 279. *Anderson's bail*, 2 *Chit. Rep.* 104. As to rendering a lunatic, *vide post*, section 3.

## SECTION II.

## BY ACT OF LAW.

By bankruptcy of principal.

ALTHOUGH the bankruptcy and certificate of the principal cannot be pleaded by the bail, in bar either to an action of debt, or to a *scire facias* on the recognizance, (h) yet the latter, when the bankrupt has obtained his certificate in due time, will be relieved by application to the summary jurisdiction of the court. This indulgence is granted on the hypothesis, that it would be unjust that the bail should continue responsible after the principal is discharged.

When advantage may be taken of it.

The certificate being obtained by the bankrupt at any time pending the action, or before the bail are actually fixed, will entitle them to be exonerated; (i) but if they are fixed before the allowance of the certificate, and while the bankrupt is capable of being sued, the court cannot relieve them. (k) And as it is not the certificate that discharges the bankrupt from his liability, but his conformity to the bankrupt laws, of which that document is only evidence, (l) where the bail became fixed, between the signing of the bankrupt's certificate by his creditors and the commissioners, and the time of its being allowed by the Lord Chancellor, the court refused to interfere. (m)

(h) *Donnelly v. Dunn*, 1 B. & P. 448. 2 id. 45. s.c. *Clarke v. Hoppe*, 3 Taunt. 46.

(i) *Martin v. O'Hara*, Cowp. 823. *Woolley v. Cobbe*, 1 Burr. 244. *Cockerill v. Awston*, id. 436. *Moorby v. Gadge*, 2 Chit. Rep. 104.

(k) *Martin v. O'Hara*, Cowp. 823. *Woolley v. Cobbe*, 1 Burr. 244. *Mannin v. Partridge*, 14 East, 599. *Clarke v. Hoppe*, 3 Taunt. 45. *Hewes v. Mott*, 6 id. 329. 2 Marsh, 37. s.c. *Harmer v. Hagger*, 1 B. & A. 339.

(l) *Bromley v. Goodbehare*, 1 Atk. 77. *Harris v. James*, 9 East, 86.

(m) *Stapleton v. Macbar*, 7 Taunt. 389. *Semble*, that a bankrupt's certificate has no relation back to any earlier period than the Lord Chancellor's allowance thereof.

The periods within which the bail may avail themselves of the bankruptcy and certificate of their principal, are governed by the same rules as those which are in general allowed for the surrender of a principal; (n) hence the bail are entitled to be discharged, upon the bankrupt's acquiring his certificate between the interval of the return of the first *sci. fa.*, and the appearance-day of the second; (m) but if the defendant, in an action, obtain his certificate before the time limited for pleading has expired, and neglect to plead it, the court will not relieve the bail on motion; and it seems, that in such a case, they could not in any manner take advantage of the bankruptcy and certificate of their principal. (o)

By act of law.

By bankruptcy of principal. When advantage may be taken of it.

Anterior to the act of 49 Geo. 3. c. 121., proving the original debt under a commission against the principal, did not release the bail; (p) but since that statute, it has been determined, that as the plaintiff, after proving under the commission, could not legally take the defendant in execution; and as he has, by electing to proceed under the commission, relinquished his action, any *ca. sa.* against the principal would be void, and that the bail are consequently discharged. (q)

An *exoneretur* was ordered to be entered on the bail-piece, where the defendant had become a bankrupt, and obtained his certificate in a foreign country after the debt was contracted, it appearing that the plaintiffs resided in the same country with the debtor, at the time of the bank-

(n) Vide post, 400.

(m) Mannin v. Partridge, 14 East, 598. Cleveland v. Dickenson, cited Tidd, 311.

(o) Clarke v. Hoppe, 3 Taunt. 46. The court in this case let in the bail to try the right in the original action, the defendant undertaking not to set up the bankruptcy and certificate as a bar, and the bail-piece in the mean time to stand as a security.

(p) 2 Bl. Rep. 1317.

(q) Linging v. Comyn, 2 Taunt. 246. Ex-parte Haynes, 1 G. & G. 108.

By act of law.

By bankruptcy of principal. When advantage may be taken of it.

Application, how to be made.

ruptcy.(r) The latter fact is material, for in a subsequent case, where it appeared that the plaintiff was resident in this country at the time of the debt accruing, and the bankruptcy of the defendant, the court refused to interpose in a summary way, but compelled the defendant to plead his certificate in his discharge.(s) In *Bamfield v. Anderson* (t) an application for leave to enter an *exoneretur* on the bail-piece, on the ground of the defendant's having obtained his certificate in Ireland, was refused; but the court directed an issue to ascertain the circumstances under which the original debt was contracted. (u)

The ancient mode of proceeding, on the bankruptcy of a principal, was for the bail to surrender him, and then for the defendant to apply to be discharged, upon an affidavit stating the fact of his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity to the commission. But according to the modern practice, where a bankrupt is clearly entitled to his discharge, the court in term, or a judge at chambers in vacation, to avoid the expense of such a circuitous mode of proceeding, will, on motion, order an *exoneretur* to be entered on the bail-piece, without a previous formal surrender of the bankrupt. (x)

It has been thought that if the validity of the commissioner be intended to be litigated, the court would order it to be tried on a feigned issue, before they directed an

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(r) *Ballantine v. Goding*, M. 24 Geo. 3. K. B. cited 4 T. R. 185. See *Whittingham v. De la Rieu*, 2 Chit. Rep. 53. *Carlier v. Langishe*, id. 55.

(s) *Pedder v. Mac Master*, 8 T. R. 609. *Smith v. Buchanan*, 1 East, 6.

(t) 5 B. Moore, 331.

(u) Vide *Phillpotts v. Reid*, 3 B. Moore, 244. 1 B. & B. 294.

(x) *Ray v. Hussey*, Barnes, 104. *Walker v. Giblet*, 2 Bl. Rep. 812. *Martin v. O'Harn*, Cowp. 823. *Southcote v. Braithwaite*, 1 T. R. 624. *Peddar v. Mac Master*, 8 T. R. 609. *Joseph v. Orme*, 2 N. R. 180. *Thackrey v. Turner*, 1 B. Moore, 457.

*exoneretur* to be entered; (y) but the accuracy of this opinion has been doubted; and in a recent case, (z) the Court of King's Bench determined, that they might, under such circumstances, relieve the bail, without previously directing an issue to try the fact of the bankrupt's being a trader; as the certificate, by the 5th Geo. 2. c. 30. s. 7 & 13., is made sufficient evidence of the trading, and other proceedings precedent to its being acquired.

By act of law.

By bankruptcy of principal. Application, how to be made.

Although the bail may be relieved during any stage of the proceedings, even after the money has been levied under an execution, (a) yet the application for their discharge should be made before any further steps are taken against them, otherwise they will only be entitled to that indulgence, on the condition of paying the costs subsequently incurred. (b) Where the principal, after being arrested, and putting in bail became bankrupt, and obtained his certificate, and an agreement was afterwards entered into for the payment of the whole debt by instalments, with notice to the bail; it was holden, that as they were entitled to be discharged, the *sci. fa.* and execution against them ought be set aside; but as the proceedings by their own default had been voluntarily allowed to be carried to such a length, the rule was only made absolute on payment of costs. (c)

Costs of application, &c.

The discharge of the principal under an insolvent act, before the bail are absolutely fixed, will entitle them to

By principal being discharged under insolvent act.

(y) *Stacey v. Federici*, 2 B. & P. 390. *Willison v. Smith*, cited 1 Tidd, 312. n. (a)

(z) *Harmer v. Hagger*, 1 B. & A. 332. Vide ante, 109. and cases there cited.

(a) *Mannin v. Partridge*, 14 East, 598.

(b) Id. *Willison v. Whitaker*, 2 Marsh, 383. *Crofts v. Johnson*, 1 id. 59. *Harmer v. Hagger*, 1 B. & A. 332. *Thackrey v. Turner*, 1 B. Moore, 457. s. c. 8 Taunt. 28.

(c) *Thackrey v. Turner*, 8 Taunt. 28. s. c. 1 B. Moore, 457. *Moorby v. Gadge*, 2 Chit. Rep. 104.

By act of law.

By principal being discharged under insolvent act.

have an *exoneretur* entered on the bail-piece in, the same manner as if he had become a bankrupt and obtained his certificate. (d) Where a defendant had given a *cognovit* for the debt and costs, payable by seven instalments, and after the bail were fixed, an act passed for discharging insolvent debtors in custody, for debts due at a certain day prior to the bail being fixed, on which day, three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable, yet it was adjudged that the bail were liable for the whole condemnation-money, the entire debt, *quæ* debt, being due *instante* with a stay of execution only, for certain portions at certain times. (e)

By principal being made a peer or member of parliament.

As peers or members of the House of Commons cannot be surrendered by the bail in their discharge; (f) if the defendant become a peer either by descent or creation, (g) or the principal be elected a member of the House of Commons (h) pending the action, the court will order an *exoneretur* to be entered on the bail-piece.

By principal being sent abroad under alien act.

Where a defendant is sent out of the kingdom under the Alien Act, the bail will be entitled to an *exoneretur* upon an affidavit that they are not indemnified, and have no money in their hands sufficient to answer the plaintiff's demand. (i) In *Coles v. De Hayne*, (k) where the bail, under such circumstances, defended the action, and after verdict, applied to be discharged on payment of

(d) ——— *v. Bruce*, 2 Chit Rep. 105. Anon. E. T. 1214. MS. cited Archibald's Prac. 283.

(e) *Shakespeare v. Phillips*, 8 East, 433.

(f) Vide ante, p. 47. 49.

(g) *Trinder v. Sherley*, Doug. 45.

(h) *Langridge one, &c. v. Flood*, 1 Tidd, 314. 7th ed. s. c. cited in *Grant v. Fagan*, 4 East, 190.

(i) *Merrick v. Vaucher*, 6 T. R. 50. *Coles v. De Hayne*, id. 52.

(k) Id. 6 T. R. 246.

1000*l.*, which was the amount of the verdict against the original defendant, and which had been deposited in their hands as a security; the court were of opinion, that as the bail had chosen to defend the action, with the view of taking the chance of a verdict in their favour, they ought to pay the costs. An *exoneretur*, however, will not be entered on the bail-piece whilst the defendant continues in this country, on the ground, that the principal is in custody, and on the eve of being sent away under the Alien Act. (*l*)

By act of law.

By principal being sent abroad, under alien act.

After a defendant has been convicted of felony, and sentenced to transportation, (*m*) the bail are entitled to their discharge; but under such circumstances, the court will not grant a *habeas corpus* to bring up the defendant, in order that he may be surrendered; (*n*) the proper course being to move for permission to enter an *exoneretur* on the bail-piece. (*o*)

By the principal being convicted of a crime.

Where the defendant was in custody under a charge of murder committed in Ireland, and a true bill was found by the grand jury in that country against him, and an application had been made to the Secretary of State to send him over there, in order to take his trial, the Court of King's Bench, though they granted a *habeas corpus* to bring him up, in order that he might be surrendered by his bail, would not, without an actual surrender, allow an *exoneretur* to be entered. (*p*)

Where a party is arrested for a debt of less than 20*l.* and has given bail, and is afterwards impressed into His

By principal being impressed.

(*l*) Folkein v. Critico, 13 East, 457.

(*m*) Wood v. Mitchell, 6 T. R. 247.

(*n*) Fowler v. Dunn, 4 Burr. 2034.

(*o*) Wood v. Mitchell, 6 T. R. 247. Robertson v. Patterson, 7 East, 407, 408. As to surrendering the principal under such circumstances, vide post, section 3.

(*p*) Sharp. v. Sheriff, 7 T. R. 226. Daniel v. Thompson, 15 East, 78. See Bennett v. Kinnear, 3 B. Moore, 259. The King v. Johnson, 6 East, 583. 2 Smith, 591. s. c., et post.

By act of  
law.

By principal  
being im-  
pressed.

By principal  
being com-  
mitted un-  
der a crown  
extent.

By act of  
a foreign  
state.

Majesty's service, the bail, by the equity of the statute 23 Geo.3. c.35. s.22. are entitled to be relieved from their liability, if they are not indemnified, and the impress is sworn to have been made without collusion; (q) but we have seen, that where the bail, under similar circumstances, have permitted the plaintiff to proceed against them to judgment, they will not be exonerated. (r)

The fact of the defendant being in custody under an extent, at the suit of the crown, and therefore incapable of being rendered, without the express consent of its officers, will not enable the bail to obtain permission for an *exoneretur* to be entered on the bail-piece, as the court will only grant that indulgence to the bail, where the defendant is placed irrecoverably out of their control. (s)

The only case in which the courts will interfere on behalf of the bail, and allow an *exoneretur* to be entered, where the power of the bail to render their principal has been taken away by some act or law, is, when it proceeds from an act or law of our own state; but there is no instance of the bail being exonerated where the inability to render has originated from the act of a foreign government; (t) therefore, where the principal was detained in France as a prisoner of war, under an edict of the government of that country, the court refused to interpose. (u)

(q) *Robertson v. Patterson*, 3 Smith, 556. 7 East, 405. s. c.

(r) *Bryan v. Woodward*, 4 Taunt. 557. vide ante 117. And the observations of Lord Ellenborough in *Robertson v. Patterson*, 7 East, 407. 3 Smith, 556. s. c.

(s) *Hodgson v. Temple*, 5 Taunt. 503. 1 Marsh, 166. See *Robertson v. Patterson*, 7 East, 403. 3 Smith, 556. s. c.

(t) *Grant v. Fagan*, 4 East, 189.

(u) *Id.* And see *Robertson v. Patterson*, 7 East, 404. 3 Smith, 556. s. c. *Hodgson v. Temple*, 5 Taunt. 509. 1 Marsh, 166. s. c.



## SECTION III.

## BY ACT OF THE PARTIES.

THERE are various circumstances arising from the conduct of the parties, under which the bail will be discharged; the most prominent is, that of rendering the principal. This is deemed equivalent to perfecting bail; and as the plaintiff obtains by that proceeding the security of the defendant's body, instead of the security of the property of the bail, he is considered to have no reasonable ground for complaint. (x) By render  
of principal.

The bail to the sheriff, it has been before stated, may be discharged, either by bail above being put in and justified, or by bail above being put in, and the principal thereupon rendered; and that this may be done by the bail to the sheriff, or by the defendant himself, or by the sheriff, or by the defendant's attorney, in discharge of any undertaking he may have given. (y) By whom  
made.

It was formerly conceived, that bail who had been excepted to, were compelled to justify, to enable them to render the principal; (z) but it is now a settled rule in all the courts, that bail, against whom an exception has been entered, though they may be unable to justify, are competent to render the principal. (a) This course may be pursued, even after the sheriff has been ruled to bring By bail who  
have not  
justified  
after excep-  
tion.

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(x) *Harford v. Harris*, 4 Taunt, 669. *The King v. the Sheriff of Middlesex*, 2 M. & S. 562. *Chadwick v. Battye*, 3 M. & S. 283.

(y) Vide ante, p. 282, and *Rex v. Butcher*, Peake, N. P. C. 169.

(z) *Mitchell v. Morris*, 2 Bl. Rep. 1179. Anon. id. 758. *Perrot v. Hele*, 3 Wils. 58. *Hall v. Walker*, 1 H. Bl. 638.

(a) In *K. B. Ashton v. King*, M. T. 21 Geo. 3. cited 1 Tidd, 306. 7th ed. R. T. 33 Geo. 3. *Edwin v. Allen*, 5 T. R. 401. *Wiggins v. Stevens*, 5 East, 533. 2 Smith, 532. s. c. *The King v. the Sheriff of Middlesex*, 1 Chit. Rep. 445. In *C. P. Seaver v. Spraggon*, 2 N. R. 85. *Walde v. Rowland*, M. 24 Geo. 3. cited Imp. C. P. 122. *Hall v. Walker*, 1 H. Bl. 639. In Exchequer, *Gore v. Williams*, Anstr. 653. *Jaques v. Holland*, id. 655.

By act of  
the parties.

Render  
by bail who  
have not  
justified  
after excep-  
tion.

By, bail who  
have been  
rejected.

in the body, or the plaintiff has taken an assignment of the bail-bond ; but as the conditions on which the bail to the sheriff will be relieved have been already pointed out and considered, (b) it will here suffice to limit our attention to the persons by whom a render may be made, within what time it is allowed, and the effect it will have on the situation of bail to the action.

In the King's Bench, persons who have been rejected as incapable of justifying, are nevertheless qualified to render the principal in their discharge, as long as their names continue on the bail-piece ; (c) and where an exception was entered against the bail, and notice of two others given, and only one of the added bail justified, the court determined, that as the names of the former were not struck out of the bail-piece, they might, at any time before that was done, surrender the defendant ; (d) and the same rule obtains, where one only of the bail justify ; he and the other may render the principal, (e) although an allowance of further time to justify new bail has been refused. (f)

In the Common Pleas the practice is different ; for although in that court any bail are sufficient to make a surrender, yet bail who have been rejected are considered as no bail ; and although no rule has been obtained to strike their names off the bail-piece, they are incompetent to make a surrender (g) unless they enter into a new recognizance, and before justification render the defendant. (h)

(b) Ante, p. 255.

(c) *The King v. the Sheriff of Essex*, 5 T. R. 633. Per Cur. E. 40. Geo. 3. K. B. MS. Easter Term, 1817. cited 1 Arch. Prac. 286. *The King v. the Sheriff of Middlesex*, 1 Chit. Rep. 445. See *Mills v. Head*, 1 N. R. 138.

(d) *The King v. the Sheriff of Essex*, 5 T. R. 633.

(e) Anon. 1 N. R. 138. n.

(f) Anon. E. T. 40 Geo. 3. K. B. cited 1 Chit. Rep. 446. n. a.

(g) *Mills v. Mead*, 1 N. R. 137.

(h) *Bell v. Gate*, 1 Taunt. 163.

In *Perrot v. Hele*, (i) it was laid down as a rule by the court, that when bail above are excepted to, and cannot justify, they are considered as a nullity, and therefore cannot render the defendant to prison, but other fresh bail may be put in, and before any exception taken to them, they may render the defendant in discharge of themselves; but this doctrine is now exploded, and it is perfectly clear, that in the Common Pleas, as in the King's Bench, the bail may render without justifying. (k)

By act of  
the parties.

Rendered  
by bail who  
have been  
rejected.

As putting in bail, merely with a view of rendering the defendant, is only a matter of form, (l) any unqualified person, such as an attorney or attorney's clerk, (m) sheriff's officer, or other persons prohibited by rule of court from becoming bail, will be sufficient for that purpose; (n) but the proceedings even in this case, must, in point of form, be conducted with strict regularity; therefore, where one bail only was put in, a render by that one was holden insufficient, and the plaintiff was allowed to proceed upon the bail-bond. (o)

The principal may be either rendered by the bail, or voluntarily render himself at any time pending the suit, or even after judgment has been obtained, provided the render be complete, before certain proceedings have been taken against the bail, which will be now discussed, and which vary according to the fact, of whether the bail are sued by action of debt, or *acire facias*.

Within  
what time  
allowed.

(i) 3 Wils. 58.

(k) In *Bell v. Gate*, 1 Taunt. 163. Heath, J. said, Any person whatsoever, even if they came out of Newgate, might become bail, for the purpose of rendering the defendant. See *Holward v. Andre*, 1 B. & P. 32. *Mitchell v. Morris*, 2 Bl. Rep. 1179.

(l) MS. E. T. 1817. Arch. Prac. 285.

(m) Per Cur. M. 42 Geo. 3 K. B. cited 1 Tidd, 270. n. (n) Anon. 1 Chit. Rep. 714. n. K. B. *Jackson v. Trinder*, 2 Bl. Rep. 180.

(n) Vide ante, p. 270.

(o) See 1 Arch. Prac. 286. cites Cro. Eliz. 672. Barnes, 46. 172.

By act of  
the parties.

Render  
within  
what time  
allowed,  
when the  
bail are  
sued by  
action.

In the King's Bench, if the plaintiff elect to proceed against the bail by action of debt, they may at any time, before the return of the *ca. sa.* against the principal, as a matter of right, render him in their discharge, and such render may be taken advantage of by pleading it in bar; (p) but after the return of the *ca. sa.*, though the render be made within the time allowed for that purpose by the indulgence of the court, the bail can only avail themselves of it by motion. (q) The additional time thus allowed for the render is regulated by a rule of court, (r) which has ordered, that if bail be impleaded upon the recognizance, he shall have liberty to surrender the defendant in his discharge, in the space of eight entire days in full term next after the return of the process against the bail, (s) if by bill, or till the *quarto die post*, if by original; (t) and in computing these days, Sunday is reckoned, if it be not the last day of the time prescribed. (u) Where there is not the limited number of days, in the same term, they must be made up in the succeeding one. In calculating the time, it has been decided, that if the surrender be made within eight days after the return of the process, on which there is an effectual proceeding, it is sufficient; hence, if the plaintiff, after suing out a *latitat* on the recognizance and non-render by the bail, die within the eight days, and his executors commence a fresh action, the bail have eight days for surrendering the principal, from the return of the process in

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(p) Vide ante, 367.

(q) *Wilmore v. Howard*, 1 Ld. Raym. 156. *Anon.* 1 Salk. 101. *Shuttle v. Wood*, 6 Mod. 132. *Holt*, 612. s. c. 1 Salk. 564. s. c. *Creswell v. Hern*, 1 M. & S. 742. *Smith v. Lewis*, 2 Chit. Rep. 100.

(r) M. T. 1 Ann. Reg. K. B. 1 Ld. Raym. 721. *Smith v. Lewis*, 2 Chit. Rep. 100. *Creswell v. Herm*, 1 M. & S. 741.

(s) M. T. 1 Ann. Reg. (t) *Bailley v. Smeathman*, 4 Burr. 2134.

(u) *Creswell v. Green*, 14 East, 537.

the second action. (x) So, if bail be served with a writ in a suit on the recognizance, and die before the expiration of the time limited for the render, and fresh process is issued against his executors, they have until the end of the eight days after the return of the second writ, to surrender the defendant; (y) and where an action was irregularly commenced, and afterwards discontinued, and the bail rendered the principal before a new action was brought, the court considered the render to be good, it being made before the return of the process in the latter. (z)

By act of  
the parties.

Render,  
within  
what time,  
when the  
bail are  
sued by  
action.

Where bail are sued by attachment of privilege, they are allowed the same period for rendering as in other cases; (a) and if an action be brought against bail in the King's Bench, on a recognizance entered into in the Common Pleas, the bail will have the same indulgence extended to them as if the recognizance had been taken in the former court. (b)

Where a cause has been removed from an inferior court by *habeas corpus*, the defendant may be rendered at any time before a *procedendo* actually issues. (c)

In the Common Pleas the render must be made on or before the *quarto die post* of the return of the process against the bail; (d) and in that court it is necessary that the writ should be served on them four days at least before the return.

In the Exchequer, only four days are allowed to the bail to surrender their principal, when the plaintiff pro-

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(x) *Wilkinson v. Vass*, 8 T. R. 422. *Meddowcroft v. Bowen*, 1 E. & P. 61. And see *Byrne v. Aguilar*, 3 East, 307.

(y) *Meddowcroft v. Bower*, 1 B. & P. 61.

(z) *Hoare v. Mingay*, 2 Stra. 915.

(a) *Fletcher v. Aingell*, 2 H. Bl. 117.

(b) *Fisher v. Branscombe*, *Same v. Sutton*, 7 T. R. 353.

(c) *Farquharson v. Foucheeour*, 16 East, 387.

(d) R. M. 1654. *Fletcher v. Aingell*, 2 H. Bl. 118. See 8 T. R. 424.

By act of  
the parties.

Render,  
within  
what time,  
when the  
bail are  
sued by  
action.

Within  
what time,  
when the  
bail are sued  
by *sci. fa.*

ceeds by *subpoena*, (e) though eight days are allowed when the proceeding is by *quo minus*. (f) In calculating the four days, one is reckoned inclusive, and the other exclusive. (g)

When a render is intended to be made on the last day limited for that purpose, it must be effected before the rising of the court; (h) for a render at half past eleven o'clock at night of the day on which the time expired, without actually bringing the defendant into court, or before a judge, prior to the rising of the court, has been holden insufficient. (i)

Notwithstanding there are some fluctuating opinions and contradictory decisions in the books (h) respecting the time allowed to bail to render their principal when sued by a *sci. fa.*, it is now finally settled, that in an action by bill, (l) in the King's Bench, the bail have until the return-day of the *scire facias* to render their principal, if the bail have been summoned, and *scire faci* returned; or until the return of the second *sci. fa.* if the first be returned *nihil*. In actions by original in that court and in the Common Pleas, the bail have until the *quarta die post* of the return of the first or second *sci. fa.* respectively, in the same manner as in action by bill in the King's Bench. (m)

The render, when made on the last of the limited number of days, must be made *sedente curia*; for a render

(e) *Bennett v. Forester*, 2 Price, 296. *Waring v. Jervis*, 5 Price, 170.

(f) *Rolfe v. Cheetham*, Wightw. 79.

(g) 2 Price, 298. (n)

(h) *Lardner v. Bassage*, 2 H. Bl. 593. *Fletcher v. Aingell*, id. 117.

(i) *Hunt v. Cox*, 3 Burr. 1360. 1 Bl. Rep. 393.

(k) *Walmsley v. Havand*, Cro. Eliz. 618. *Alyson v. Byston*, id. 738. *Glynn v. Yates*, 8 Mod. 32. *Willmore v. Clerk*, 1 Ld. Raym. 156. Anon. 6 Mod. 238.

(l) Id. et vide *Mannin v. Partridge*, 14 East, 599.

(m) *Bailey v. Smeathman*, 4 Burr. 2134. *Hunt v. Cox*, 3 id. 1360. 1 Bl. Rep. 393. *Vanderesh v. Waylet*, Ca. Pr. C. P. 53. *Derisley v. Deland*, Barnes, 82.

at a judge's chambers; after the court has risen, will be of no avail. (n)

By act of  
the parties.

The time thus prescribed, will not, in general, be enlarged, to enable the bail to surrender their principal. The only instances in which this indulgence has been granted, have been cases, where, from the extraordinary nature of the facts, injustice would have ensued from the refusal of the application.

Enlarge-  
ment of time  
to render  
principal.

Thus, where a commission of bankruptcy had issued against the principal in the country, and the consequence of an immediate surrender would have been to compel the commissioners, acting under the commission, to come a considerable distance from the country, in order to examine the bankrupt in the King's Bench prison; the court, after some hesitation, enlarged the time for the render. (o) And it seems, that where this indulgence is granted, and the state of the cause requires it, the plaintiff will be permitted forthwith to sue out a *sci. fa.* against the bail, on the condition of the former undertaking not to proceed unless the latter omit to surrender their principal at the expiration of the additional time given them. (p) The provision of the stat. 49 Geo. 3. c. 121. permitting a bankrupt in custody on execution, to be brought before the court, will not prevent an enlargement of the time being obtained for his surrender in discharge of the bail; (q) and the court, in *Glendining v. Robinson*, (r) compelled the bail to pay the costs of the application, and to undertake to give the plaintiff notice when the last examination finished.

In case of  
bankruptcy.

In the affidavit on which the motion for an exten-

(n) *Bailey v. Smeathman*, 4 Burr. 2134. 1 Wils. 270. *Hunt v. Cox*, 3 Burr. 1360. 1 Bl. 593. s. c. *Lardner v. Bassage*, 2 H. Bl. 593.

(o) *Maude v. Jowett*, 3 East, 145.

(p) *Glendining v. Robinson*. 1 Taunt. 321.

(q) *Crump v. Taylor*, 1 Price, 74. See 2 Chit. Rep. 101.

(r) 1 Taunt. 321.

By act of  
the parties.

Enlarge-  
ment of time  
to render  
principal.  
In case of  
sickness.

sion of time is made, it must be distinctly alleged that the application is made on behalf of the bail; or at least, that it is made with their consent. (s)

The ill health of the principal, and even a statement that his life would be endangered by the removal, will not afford sufficient grounds to induce the court to enlarge the time for the render. (t) The loss attendant upon such a casualty, it has been observed, ought rather to be borne by the bail, who must be fixed for not complying with their undertaking, than by the plaintiff, who would otherwise be delayed of his right; (u) but as this case goes no further than to establish, that where the inconvenience arises from the act of God, it ought rather to be sustained by the bail, than by the plaintiff, it was holden in *Winstanley v. Gaitskell*, (x) that when the defendant is in the custody of the law, and not of the party who is to bring him up, the law will not allow him to be taken out of that custody at the peril of his life. (y)

The distinction is between cases of legal impossibility, as contra-distinguished from cases of moral impossibility.

In case of  
insanity.

The defendant's lunacy is no ground for further time to surrender, unless it be sworn that his removal would probably endanger his own life or those of others, or that by remaining in his present custody, he would be likely to recover. (z)

In case of  
detention  
abroad.

Nor will the circumstance of the defendant having

(s) *Harris v. Glossop*, 2 Chit. Rep. 101.

(t) *Wynn v. Petty*, 4 East, 102.

(u) *Id.*

(x) 16 East, 398.

(y) In this case the principal was in custody under process of another court, and the officers to whom a writ of *habeas corpus* had been directed, returned, that the defendant could not be removed without danger to his life, and that such impossibility still continued. 16 East, 389.

(z) *Cock v. Bell*, 13 East, 355; See *Anderson's bail*, 2 Chit. Rep. 104., and ante.



been unavoidably arrested and detained by a foreign enemy, induce the court to indulge the bail with an extension of time. (a)

By act of  
the parties.

By render.

As the principal is always considered to be in the actual or potential custody of the bail, who are, in contemplation of law, his gaolers, they may at any time during the continuance of their liability seize and render him in their discharge. The legal power and control which the bail possess over their principal is adequate to the attainment of this object. Hence they may justify breaking and entering a house (the outer door being open) in which the principal resides, in order to prosecute a search for him; and, in this respect, there is no distinction between a house of which he is solely possessed and a house in which he resides by the consent of another. (b) The right of the bail in rendering the principal is not circumscribed within the same limits as the right of arresting the party. Bail may, therefore, render persons who would be protected from arrest, whether that protection arose from personal, temporary, or local causes. On this principle it has been decided, that although a soldier cannot be taken out of His Majesty's service, except upon a criminal charge, yet he may be surrendered by his bail; (c) and the same rule obtains with regard to seamen and marines. (d) Neither are witnesses and parties to a cause attending courts of justice (e) exempt from the control of their bail, and they may be seized while in actual attendance upon the court; and it has been

Privileges of  
bail in tak-  
ing princi-  
pal.

(a) *Grant v. Fagan*, 4 East, 189., et vide, ante p. 396.

(b) *Sheers v. Brooks*, 2 H. Bl. 120. See *Semayne's case*, 5 Rep. 916. *Lee v. Gansel*, Cowp. 1.

(c) *Boyles v. James*, 1 Stra. 2.

(d) *Robertson v. Patterson*, 3 Smith, 556. 7 East, 405, s. c. *Bryan v. Woodward*, 4 Taunt. 557. *Bond v. Isaac*, 1 Burr. 339.

(e) *Horn v. Swinford*, 1 D. & R. N. P. C. 50. Ante, p. 38.

By act of  
the parties.

By tender.  
Privileges of  
bail in tak-  
ing princi-  
pal

already shown, that the statute 5 Geo. 2. c. 30. s. 5., which confers protection on bankrupts for the space of forty-two days after they have submitted to the commissioners, does not apply to cases where they are in actual custody; and it follows that the bankrupt is not entitled to protection even while under examination before the commissioners, against the common-law-right of his bail. (f)

The act of 29 Car. 2. c. 7., which prohibits the execution of process on a Sunday, leaves the power of the bail unaffected; and they may consequently take their principal on that day, and confine him till Monday, and then surrender him. (g)

After the intention of the bail to surrender the principal has been notified to him, and he refuses to accompany them, they may use such a degree of force and restraint as will be adequate to the accomplishment of their object; and when necessary, may require the aid of others; and if evil consequences ensue, it will be at the peril of the principal. (h)

It has been suggested, that after the defendant has been taken, one of the bail should continue with him until he has been formally rendered, unless he will consent in writing to remain in the custody of a third person; (i) but this precaution does not appear to be necessary, as it is now perfectly clear that the defendant may be detained in custody by any person properly authorized by the bail. (k)

(f) Ante, p. 94. MS. cited, 1 Arch. Prac. 486. See vide *ex-parte* Leigh, 1 G. & J. 264. It does not appear, from the report in this case, that any of the numerous authorities on this point were quoted.

(g) Anon. 6 Mod. 231. French's case, id. 247. Walgrave v. Taylor, 1 Ld. Raym. 705. See 2 Haw. P. C. 15. 1 Bac. Ab. tit. Bailiff, 233. 4 Com. Dig. Bail, (A.) et vide ante, p. 123. & Stat. 5 Ann. c. 9. s. 3., by which a defendant may be taken on an escape warrant on a Sunday; and Brooks v. Warren, 2 Bl. Rep. 1273.

(h) Rex v. Butcher, Peake, N. P. C. 168. Pyewell v. Stow, 3 Taunt. 425.

(i) 1 Sell. Prac. 176. 1 Arch. Prac. 287.

(k) Pyewell v. Stow, 3 Taunt. 426.

When the principal, from the circumstance of being in custody under legal process, is placed beyond the power of his bail, he may in general be brought up by writ of *habeas corpus cum causa*, in order to be rendered in their discharge. This writ may be sued out as a matter of course, where the defendant is detained upon civil process; but where he is in custody on a criminal charge, the previous leave of the court should be obtained; (kk) and in *Sharp v. Sheriff* (l) Lord Kenyon observed, that a motion for this purpose was not to be considered as an application to the favour of the court, but what the bail were entitled to ask, *ex debito justitiæ*. Thus where the defendant was in custody of the sheriff under a charge of felony, the court granted a *habeas corpus* notwithstanding the apparent objections that the bail were indemnified; (m) and the circumstance of the principal being actually convicted, and under sentence of transportation, will not divest the bail of their right to the benefit of the writ, (n) unless the defendant be actually on board the convict ship at the time of the motion being made. (o) When, however, the defendant is in the criminal custody of the Court of King's Bench, the Court of Common Pleas will not interfere by granting a *habeas corpus* to take him out of such custody in order to have him surrendered in discharge of his bail. (p)

By act of the parties.  
Habeas corpus to render principal.

A *habeas corpus* will also be granted to bring up a lunatic confined in a public hospital, that he may be surrendered; (q) or a man impressed into His Majesty's ser-

(kk) Vide post, Part III.

(l) 7 T. R. 226.

(m) 1 *Sharp v. Sheriff*, 7 T. R. 226. *Daniel v. Thompson*, 15 East, 77.

(n) *Vergen's bail's case*, 2 Stra. 1217.

(o) *Fowler v. Dunn*, 4 Burr. 2034. See 5 Vin. Ab. 297. pl. 2. 6 Com. Dig. 63.

(p) *Bennett v. Kinnear*, 3 B. Moore, 259. *Beaumont v. Thurtell*, M. T. 1893. G. P. MS.

(q) *Pillop v. Sexton*, 3 B. & P. 559. *Cock v. Bell*, 13 East. 355. See *Freeman v. Weston*, 1 Bing. Rep. 221.

By act of  
the parties.

*Habeas corpus* to render principal.

vice; (r) or a principal who has been committed to Newgate by the commissioners of bankrupts, for not satisfactorily answering questions propounded to him; (s) or a King's debtor confined in the Fleet may be brought up by *habeas corpus*, issuing from the King's Bench, to enable his bail to render him in their discharge in an action instituted in that court; (t) but such a course, it is to be remarked, cannot in general be pursued when the defendant is in custody as a crown debtor, without the previous consent of the officers of the crown. (u)

To enable the bail to move for a *habeas corpus*, it is necessary that they should first justify. (x)

When the defendant is in custody on a criminal charge, this motion is viewed as a proceeding on the crown side of the court, (y) and the prisoner, on being brought up, is in all cases nominally committed to the custody of the Marshal or the Warden, and then immediately afterwards removed to the prison, whence he has been brought. (z) The writ may be sued out in term or in vacation, and may be made returnable immediately, though it is necessary that it should be tested in term.

Of the manner of rendering principal.

The defendant, whether he rendered himself voluntarily or is taken coercively by his bail, must attend either in court, or which is more usual, before a judge at his chambers, and the court or judge will make out a minute of the render and commitment, and deliver the defendant to the tipstaff, who will thereupon convey him to the

(r) *Bond v. Isaac*, 1 Burr. 339.

(s) *Taylor's case*, 3 East, 232.

(t) *Boise v. Sellers*, 1 Stra. 641.

(u) *Hodgson v. Temple*, 1 Marsh, 166. s. c. 5 Taunt. 181. 503.

(x) *Sharp v. Sheriff*, 7 T. R. 226.

(y) *Fowler v. Dunn*, 4 Burr. 2034. *Taylor's case*, 3 East 232.

(z) See *Bond v. Isaac*, 1 Burr. 340. *Sharp v. Sheriff*, 7 T. R. 226. *Daniel v. Thompson*, 15 East, 78. *Hodgson v. Temple*, 5 Taunt. 181. s. c. 1 Marsh, 166. *Freeman v. Weston*, 1 Bing. Rep. 221.

King's Bench or Fleet prison. Although this is the ordinary practice, it is not absolutely necessary that the defendant should be taken to the judge's chambers for the purpose of being rendered, unless he expressly desire it; but he may be conveyed forthwith to gaol, under a *committitur*. (a) In the King's Bench it is a rule, that the state of the cause at the time of the render should be entered under any commitment. If before declaration "*the sum sworn to on the arrest*;" if a declaration, has been filed or delivered, then to the sum sworn to, should be also added, "*declaration filed or delivered*;" *issue joined*; or "*interlocutory judgment signed*;" as the case is: If after final judgment in debt, "*the debt and damages*;" in other cases, "*the quantum of the damages*."

By act of  
the parties.

Of the man-  
ner of ren-  
dering prin-  
cipal.

In the Common Pleas, the filacer attends with his book at the judge's chambers, and takes the render: And in *Ling v. Woodyer*, (b) where the render had been made on the last day of the term, that court directed the exact hours of the surrender, to be entered by the filacer, in order that it might appear whether it was made prior or subsequent to the rising of the court. In either court, the render may be made by the party himself, without the aid of an attorney. (c)

The plaintiff is presumed to be ignorant of the render until formal notice has been regularly served upon him. An adherence to this rule is highly salutary, as it prevents the introduction of conflicting affidavits, and the admission of constructive notices, from being made available. In the King's Bench it is expressly ordered, "that where any defendant shall be rendered into the custody of the Marshal, in discharge of his bail,

Notice of  
render.

(a) *Davis v. Fowler*, 2 Chit. Rep. 74.

(c) *Nethersole's Bail*, 2 Chit. Rep. 99.

(b) *Barnes*, 69.

By act of  
the parties.

Notice of  
render.

the attorney shall without delay give notice of such render to the plaintiff's attorney, and shall make affidavit thereof, before the bail in that action shall be discharged; and, in default thereof, such render shall be void. (d) And by R. T. 1 Ann. c. 1., if the bail be impleaded by action of debt upon the recognizance, then upon notice of the render being given to the plaintiff or his attorney, all further proceedings against the bail shall cease.

In construing these rules, it has been uniformly determined, that the effect of the render is not absolutely vitiated by the omission to give notice, but that it is only inchoate and imperfect, until notice has been actually served; hence it has been adjudged, that if the principal be surrendered within the regular time, but the bail neglect to give due notice of this fact to the plaintiff, in consequence of which he proceeds against them, upon the bail-bond or recognizance, that they are entitled to be relieved upon payment of the costs incurred by their own laches, and that such relief may be obtained even after judgment has been signed or execution has been levied against the bail, and the proceeds of the execution are in the hands of the sheriff. (e) So in *Hughes v. Poidevin*, (f): it was decided that the plaintiff was entitled to the costs of an action against the bail, commenced after a return of *non est inventus* to the *capias ad satisfaciendum* against the principal, though the bail had rendered him before the expiration of the eight days allowed by the practice of the court, after the return of

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(d) T. T. 1 Ann. Reg. 2. See R. T. 33 Geo. 3. 5 T. R. 368. See *Harding v. Hennem*, 3 B. & P. 232. In C. P. *The King v. the Sheriff of London*, 1 Price, 331. in Exchequer.

(e) Anon, 6 Mod. 238. *Wild v. Harding*, 8 Mod. 281. *Lepine v. Barrat*, 8 T. R. 223. *Hughes v. Poidevin*, 15 East 254. 4 Bac. Ab. 420. 423. *Harding v. Hennem*, 3 B. & P. 232.

(f) 15 East, 254.

the process against the bail. These decisions are strictly consonant with the two rules of court, which, it has been shewn, respectively require that notice of render should be given, and that after such notice all further proceedings should determine; but there are several recent cases in which the preceding decisions either appear to have been qualified or overruled. Thus, in *Smith v. Lewis*, (g) and in *Creswell v. Hern*, (h) it is reported to have been holden, that the bail, having rendered their principal in time, according to the practice of the court, are entitled to stay the proceedings in an action on their recognizance, without costs, though the plaintiff may have commenced his action before he was served with notice of the render. But with reference to the last-cited cases, it may be proper to suggest that the attention of the court seems to have been exclusively confined to that rule, which orders, that all proceedings against the bail shall cease upon notice of the render; and that the counsel in argument, or the court in giving judgment, did not advert to the rule first quoted, which directs, that until regular notice has been given the render is to be considered a nullity. This collision of authorities has originated partly from the render having been considered as perfect without notice, and partly from the words, "and that on notice thereof all further proceedings shall cease," having been construed as restricting the court from compelling the bail to pay the costs; because, requiring such a payment would be imposing a new condition upon the bail, contrary to the express language of the rule. It might, however, in answer to these objections, be fairly contended, that the words "*no further proceedings*," rather convey an idea that no new step shall

By act of  
the parties.

Notice of  
render.

(g) 16 East, 168. 2 Chit. Rep. 100 s. c.

(h) 1 M. & S. 742.

By act of  
the parties.  
Notice of  
render.

be taken by the adverse party against the bail, than interdicting the court from imposing such terms, with regard to the costs, as justice and equity dictate. The distinction may, perhaps, be concisely stated to be between the act of the plaintiff and the act of the court.

In argument, it has been suggested, (i) that though the plaintiff is not at liberty, according to *Smith v. Lewis*, and *Creswell v. Hern*, to require, as a condition of staying proceedings, that his costs shall be paid, it is still open to him, according to *Hughes v. Poidevin*, to apply to the court by a separate motion for the payment of the costs; but this method of proceeding would be obviously improper, because it would be within the rule, as being a new step by the plaintiff, and be open to the objection of unnecessary circuitry.

But whatever doubts may exist as to the liability of the bail to costs, when no notice has been given; it is perfectly clear, that if the plaintiff proceed after due notice of the render, he does it at his peril, the rule of court having unequivocally declared, that on such condition all further proceedings shall cease; (k) and if, under such circumstances, the plaintiff were to proceed in his action, because no tender has been made to him of the costs incurred, nor any rule obtained to stay the proceedings, the subsequent steps in the cause would be irregular.

If the question of costs depend upon whether the plaintiff knew that the defendant was in custody; it will be presumed that he did not, where no notice has been given. (m)

The preceding observations are of course confined to

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(i) 1 M. & S. 743.

(k) *Byrne v. Aguilar*, 3 East, 306.

(m) *Harding v. Hennem*, 3 B. & P. 232.

(l) Id.



proceedings against bail, by action of debt ; for where the remedy adopted is by writ of *sci. fa.* no costs are payable, unless it be after plea pleaded, or joinder in demurrer. (n)

By act of  
the parties.  
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Notice of  
render.

The notice of render need not be served before the rising of the court, on the day on which the render is made. (o)

In the King's Bench, it has been already shewn, that the rule of 1 Ann. directs an affidavit to be made of the service of the notice of render ; (p) but this document, it would appear, is only requisite for the purpose of obtaining the bail-piece from the judge's chamber, to have an *exoneretur* entered on it, and not essential to a perfect render. (q)

Affidavit of  
service of  
notice of  
render.

In the Common Pleas, an affidavit of the service of notice is not required. (r)

After the render has been effected, and due notice given, the next proceeding, in order to complete the discharge of the bail, is to enter an *exoneretur* on the bail-piece, in action by bill in the King's Bench, or in the Exchequer ; or in the filacer's book in the Common Pleas, or in actions by original in the King's Bench ; for until such entry has been made, the responsibility of the bail continues undiminished, although the defendant be in actual custody. (s) But where the attorney omitted to get the *exoneretur* entered, and proceedings were subsequently

*Exoneretur*  
after render.

(n) 8 & 9 Wm. 3. c. 11., et vide ante, p. 386., and *Byrne v. Aguilar*, 3 East, 307, 8. (o) *Wiggins v. Stephens*, 5 East, 533.

(p) See 5 T. R. 368. 8 T. R. 223.

(q) *Rex v. Sheriff of Middlesex*, 2 B. & A. 607. 1 Chit. Rep. 359.

(r) C. P. Imp. 6th ed. 502.

(s) R. E. 1 Ann. Reg. 2. *Fitzgerald v. Clanrickard*, Comb, 263. *Wild v. Harding*, 8 Mod. 282. Anon, id. 340. A. sued B. in three actions, and he put in three bails ; the plaintiff recovered in all ; the defendant rendered himself, and one of the bails entered an *exoneretur* on the bail-piece. *Per curiam*. The rendering is a discharge as to all, but is not complete as to all, till all have entered an *exoneretur* thereon. *Williams v. Williams*, 1 Salk. 98. *The King v. the Sheriff of Essex*, 5 T. R. 633.

By act of  
the parties.

*Exoneretur*  
after render.

had against the bail, the court set aside the proceedings upon payment of the costs incurred by the omission, and ordered an *exoneretur* to be entered, and the bail-piece to be filed. (t) So, where that document had been regularly delivered to the plaintiff's attorney to be filed, and he neglected to file it, the court determined that the plaintiff could not afterwards proceed against the bail, for want of an *exoneretur*. (u)

It appears at one time to have been thought a necessary proceeding to complete the render, that an entry of the *committitur* should be made in the Marshal's book, kept in the King's Bench office; (x) but it has been since adjudged, in several cases, that the Marshal's book is of no authority, and merely designed for his own convenience, to enable him and the suitors of the court with greater facility to ascertain what persons are charged in custody; (y) and it is now, therefore, clearly settled, that the entry of the render and *committitur* in the Marshal's book, is not essential either to complete the exoneration of the bail, or to discharge the sheriff. (z)

Before dismissing the subject of render, it may be useful to subjoin a concise statement of the practical mode

(t) *Sayer, 7. Bond v. Isaac, 1 Burr. 409. In Wild v. Harding, 8 Mod. 282.*, the question was, whether the principal had surrendered himself before the return of the second *sci. fa.*; and the court, in that case determined, that the best evidence of the render was the bail-piece; and that although the defendant may have surrendered himself, and have given notice of this event, he ought to pay the costs until the bail-piece was actually marked; for the plaintiff is to take notice of the *exoneretur*, and not of what the attorney for the plaintiff may have told him. Vide 1 Tidd, 313., where it is said that the court will not order an *exoneretur* to be entered on the bail-piece, upon paying the costs that have accrued subsequent to the render.

(u) *Manning v. Turner, 8 Mod. 281. Knight v. Winter, Barnes, 68.*

(x) *Watson v. Sutton, 1 Salk. 272. 1 Tidd, 6th ed. 313.*

(y) *Unwin v. Kirchoffe, 2 Stra. 1215. Hutchins v. Kenrick, 2 Burr. 1049. 2 Sell. 126. King v. Sheriff of Middlesex, 2 Smith, 243.*

(z) *The King v. The Sheriff of Middlesex, 2 B. & A. 607. 1 Chit. Rep. 959: s. c.*

of entering the *exoneretur*. In actions by bill in the King's Bench, the affidavit of service of notice of render is delivered to the judge's clerk, or officer who has the bail-piece; he, in return, gives the bail-piece to the defendant's attorney, retaining the affidavit as his voucher. The bail-piece, and certificate of the tipstaff that the defendant is in custody, is then taken to the master, who enters an *exoneretur* upon the bail-piece, receiving the certificate as evidence of his authority to make the entry. In actions by original the practice is similar, except that the affidavit of the service of notice is filed with the clerk of the rules, and the certificate of the tipstaff is taken to the filacer with whom the bail was put in, instead of being delivered to the master. In the Common Pleas, the *exoneretur* is entered in the filacer's book, at the time of making the render at the judge's chambers.

By act of  
the parties.

*Exoneretur*  
after render.

The proper course of proceeding when a misnomer has been committed has been already fully pointed out and discussed: (a) it will therefore suffice in this place merely to mention the case of *Clark v. Baker*, (b) in which it was decided that bail who have entered into a recognizance for the defendant by his right christian name, and by which name he has been declared against, cannot afterwards object to his having been misdescribed in the original writ and affidavit to hold to bail.

By misnomer  
of the prin-  
cipal.

If the plaintiff do not declare against the defendant within the period limited for that purpose, and the cause be consequently out of court, the bail are discharged, and an *exoneretur* may be entered; (c) and from *Boulcot v.*

By not de-  
claring in  
time.

(a) Ante, 288.

(b) 18 East, 273. See *Knight v. Dorsy*, 1 B. & B. 48. 3 B. Moore, 305. *Croft v. Coggs*, s. c. *Christie v. Walker*, 1 Bing. Rep. 206.

(c) *Sykes v. Bauwens*, 2 N. R. 404. In the Common Pleas, whether the defendant is in custody or not, and though the plaintiff may be in

By act of  
the parties.

By not de-  
claring in  
time.

By declara-  
tion varying  
from writ.

Hughes, (e) it seems, that where there has been great and unnecessary delay in proceeding to trial, the bail will be entitled to be relieved on their own application, though the court, under such circumstances, have refused to discharge them at the instance of the defendant.

The declaration ought in general to correspond with the numbers of the parties named in the process, and any variance in this respect will afford sufficient ground for setting it aside; (f) yet such an irregularity will not, it seems, entitle the bail to an *exoneretur*, and the plaintiff will be at liberty to declare *de novo*; (g) and in *Kerval v. Fossett*, (h) the Court of Common Pleas decided, that upon a bailable *capias* against two defendants, with a clause of *ac etiam* against one, and affidavit of debt against another, the plaintiff might regularly declare against the latter only.

But when the process is to answer the plaintiff in a special character or right, he cannot declare generally, as if the process be *qui tam*, or as executor, or as assignee of a bankrupt, (i) the declaration must correspond with it, and a deviation from this rule of pleading would discharge the bail; (k) and when bailable process is sued out to

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a situation to declare, as where he is proceeding to outlawry against one of two defendants, the cause is out of court if he does not declare before the end of the second term, or obtain further time. In the King's Bench a plaintiff must declare within twelve months after the return of the writ; if he does not deliver his declaration within two terms, a *non pros* may be signed; but if it be not signed, the plaintiff has the year to declare in. *Worley v. Lee*, 2 T. R. 112. *Penny v. Harvey*, 3 T. R. 123. See *Mara v. Quin*, 6 T. R. 7.

(e) 1 Chit. Rep. 281.

(f) *Rogers v. Jenkins*, 1 B. & P. 383.

(g) *Lewin v. Younger*, 4 East, 589. *Christie v. Walker*, 1 Bing. 206. *Thompson v. Cotter*, 1 M. & S. 55. *Stables v. Ashley*, 1 B. & P. 49. *Forbes v. Phillips*, 2 N. R. 98.

(h) 7 Taunt. 458. *Moss v. Birch*, 5 T. R. 722.

(i) *The Weavers' Company, v. Forrest*, 2 Stra. 1232. *Canning v. Davis*, 4 Burr. 2418.

(k) *Douglas v. Irlam*, 8 T. R. 416. Vide 6 B. Moore, 66. 3 B. & B. 4. s. c.

(l) *Id.*

answer the plaintiff in his own right, and he declares as acting in a representative character, the court will order a common appearance to be entered, leaving the plaintiff at liberty to proceed upon his declaration. (m)

By act of  
the parties.

By declara-  
tion not  
correspond-  
ing with  
writ.

The declaration must also correspond with the cause and form of action in the affidavit, and the *ac etiam* part of the *latitat*, or other process, or the bail will be released from their liability; and the court will not allow the declaration to be amended, so as to recharge the bail, (n) as if the writ be in an action on the case, and the declaration in debt, (o) or *vice versa*, (p) or the writ be in assumpsit and the declaration in trover, (q) or the writ be upon a bill of exchange and the declaration in covenant; (r) but a variance in the amount of the debt between the *ac etiam* part of the *latitat* and the declaration, cannot be objected to; (s) though, if no sum whatever be inserted in the *ac etiam* part of the writ, the proceedings will be irregular. (t)

If the amount sworn to is under 40*l.*, an incongruity between the form of action in the *ac etiam*, and the declaration is immaterial. (u)

In the King's Bench, when the proceedings are by special original, if the venue be not laid in the county into which the original was issued, the bail will be entitled to an *exoneretur*; (x) but in the Common Pleas their liability continues unaffected, notwithstanding such a variance. (y)

By venue  
not being  
laid in right  
county.

(m) *Hally v. Tipping*, 3 Wils. 61.

(n) *Levett v. Kibblewhite*, 6 Taunt. 483. 2 Marsh, 185. s. c.

(o) *Levett v. Kibblewhite*, 6 Taunt. 483. 2 Marsh, 185. (p) *Id.*

(q) *Tetherington v. Goulding*, 7 T. R. 80. See 1 H. Bl. 310. Cowp. 455.

(r) *De la Cour v. Read*, 2 H. Bl. 278.

(s) *Turing v. Jones*, 5 T. R. 402.

(t) *Davison v. Frost*, 2 East, 305.

(u) *Lockwood v. Hill*, 1 H. Bl. 310. 2 Saund. 52. (a).

(x) *Yates v. Plaxton*, 3 Lev. 235. 2 Viner's Ab. 507. 1 Bac. Ab. 215. R. E. 2 Geo. 2. K. B.

(y) *Imp. Pr. C. P.* 159; 160. R. H. 22 Geo. 3. C. P.

By act of  
the parties.

Declaration  
varying  
from affida-  
vit.

The necessity of the declaration being consistent with the affidavit to hold to bail, and the consequences of a material variance, have been stated in a former chapter; (a) though, in addition to what is there mentioned, it may be proper to notice, that after a plea has been demanded, and time to plead obtained, it is too late for the defendant to move for an *exoneretur*, on the ground of a variance between the cause of action stated in the affidavit, and that described in the declaration. (b)

That advantage may be taken of a variance between the affidavit of debt, and the declaration, the form of the rule obtained for that purpose, must be "on reading the affidavit and declaration," &c. (c)

By not ob-  
taining  
judgment  
against the  
principal.

If judgment be not regularly obtained and signed against the principal, or the principal pay the debt and costs, the bail, of course, are divested of all liability; and upon the former ground, it has been laid down as an established rule, (d) that if the cause be referred to arbitration, the bail are discharged, unless a verdict be taken for the plaintiff; hence, it is advisable, before consenting to a reference, to ascertain whether there are any bail to the action or not.

When a verdict is taken by consent, subject to the award of an arbitrator as to the *quantum*, judgment cannot be signed for the amount of the sum awarded, without first obtaining the usual rule for signing judgment; and where judgment was so signed against the principal, without such rule, and the plaintiff proceeded to execution against the bail, after procuring a return of *non est inventus* to a *ca. sa.* against the principal, and a return

(a) Ante, p. 150.

(b) *Knight v. Dorsy*, 1 B. & B. 48. 3 B. Moore, 305., in this case the Court said the defendant ought to have applied at the earliest moment.

(c) *Wilks v. Adcock*, 8 T. R. 27.

(d) 2 Saund. 72. b. n.

of two *nils* to two writs of *scire facias* against the bail, the court, upon application of the bail, and the principal, adjudged that they were entitled to be relieved from such judgment against the principal, and its consequences against the bail; upon an affidavit by them, that they had no notice of such judgment till the writ of *ca. sa.* issued against the bail, when they applied to vacate the proceedings. But the court decided that they could not set aside the writ of *ca. sa.* against the bail, on account of such irregularity in the judgment against the principal, while such judgment remained in force. (e)

By act of  
the parties.

By not ob-  
taining  
judgment  
against the  
principal.

But where the plaintiff, having filed a bill in Equity; and arrested the defendant in the Court of Common Pleas, for the same cause of action, had, in consequence of an order out of Chancery for that purpose, elected to proceed in Equity; the court refused to discharge the bail, but left them to move to set aside any proceedings which might be adopted against them. (f)

The principal being taken in execution, will entitle the bail to be exonerated from their liability. (g) And it has been conceived, that if the plaintiff, instead of suing out a *ca. sa.* issue a *fi. fa.* or *elegit* against the property of the principal, the same consequences would arise; but this opinion, it has been shewn, is untenable, as it has been determined that suing out a *fi. fa.* against the principal is no discharge of the bail, unless the *fi. fa.* be actually executed, and the debt and costs levied under it. (h)

By taking  
principal in  
execution.

As it is a settled rule of law, that any act of the party to

(e) *Hayward v. Ribbans*, 4 East, 309.

(f) *Horsley v. Walstab*, 2 Marsh, 548. 7 Taunt. 235. s. c.

(g) *Higgen's case*, Cro. Jac. 820. *Gee v. Fane*, 1 Lev. 225. 1 Sid. 339. s. c.

(h) MS. E. 1820. cited 1 Archbold's Prac. Add. 13. *Manning's Ex.* Prac. p. 472. n. (r) et ante 355.

By act of  
the parties.

By accept-  
ing a secu-  
rity from  
the prin-  
cipal.

whom a collateral security is given, which conduces to increase the risk of the surety or defeat his remedy, shall vacate the contract, (i) it follows, that from the analogous and relative situation of bail and principal, that any indulgence shewn by the plaintiff to the latter, without the consent of the bail, which puts them in a different situation from that in which they placed themselves by entering into the recognizance, would confer on them a right to relief. (k) This doctrine was first introduced in courts of equity, and is founded upon the principle that every surety has a right to come into a court of equity and require to be permitted to sue in the name of the original creditor.

By taking a  
cognovit.

Prior to the establishment of this rule, it had been determined that the bail were not released by the plaintiff's accepting a cognovit from the principal, unknown to the bail. (l) In accordance with this opinion, where the defendant in the action gave a cognovit for the debt and costs, payable by seven instalments, and after the bail were fixed an act passed for discharging insolvent debtors, in custody for debts due at a certain day prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become due; yet held that the bail were liable for the whole condemnation-money, the entire debt, *qua* debt being due *instantly*, with a stay of execution only for certain portions at certain times. (m)

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(i) See 2 Bro. Ch. C. 579. 2 Ves. Jun. 542. 6 Ves. Jun. 809. 3 Merv. 272. 2 B. & P. 61. 3 id. 366. Doug. 247. 2 Campb. 185. 10 East, 133. 2 M. & S. 39. 4 B. Moore, 153. Holt, N. P. C. 84.

(k) Bowsfield v. Tower, 4 Taunt. 457. Melvill v. Glendining, 7 id. 126.

(l) Hodgson v. Nugent, 5 T. R. 277.

(m) Shakespeare v. Phillips, 8 East, 483.



And even since the doctrine of giving time to the principal has been fully understood and defined, a cognovit from the principal, without the consent of the bail, where it is agreed that judgment is immediately to be signed; (n) or where the debt is payable by instalments, within the time in which the plaintiff would have been entitled to sign judgment and issue execution, had he gone to trial in the ordinary course of proceeding, (o) would not discharge the bail; but when, from the terms of the cognovit an extension of time beyond that in which the plaintiff might have gone to trial in the original cause, is granted; or where the payment of one or more of the instalments is postponed till after the period at which the plaintiff could with diligence, and according to the practice of the court, have judgment and execution, the bail will be exonerated. (p)

By act of  
the parties.

By taking a  
cognovit.

The express consent of the bail, that a cognovit shall be taken, and time granted to the principal, will of course prevent them from taking advantage of such an indulgence. (q)

It is no ground for setting aside a judgment, when it has been signed against bail, that the plaintiff has accepted a composition from the defendant, and postponed the execution of a *ca. sa.*, which had issued against him, though such an arrangement may have been entered into

By accept-  
ing a com-  
position.

(n) *The King v. The Sheriff of Surrey*, 1 Taunt. 159.

(o) *Croft v. Johnson*, 5 Taunt. 319. 1 Marsh, 59. s. c.

(p) *Bowsfield v. Tower*, 4 Taunt. 455. *Croft v. Johnson*, 5 id. 319. 1 Marsh, 59. s. c. *Thomas v. Young*, 15 East, 616. *Melvill v. Glendining*, 7 Taunt. 126. *Farmer v. Thorley*, 4 B. & A. 91. It would be very extraordinary, that if the plaintiff parted with the power of taking the defendant until default made in payment of the instalments, the power of taking him should still subsist in the bail, that power is entirely derived from, and dependant upon, the power of the plaintiff to take him. Per Heath, 4 Taunt. 458.

(q) *Bowsfield v. Tower*, 4 Taunt. 455.

By act of  
the parties

By accept-  
ing a com-  
position.

without the knowledge or consent of the bail. (r) There is a material distinction between the cases upon *cognovit*, payable by instalments, and the present decision; in the former, the judgment and execution are suspended; in the latter, the plaintiff, by remitting his legal diligence, does not bar the bail from surrendering their principal at any moment; the plaintiff has never disarmed himself, he has never put himself in such a situation that he might not at all times proceed with his action. (s)

By taking a  
bill or note.

So in the case of *Melvill v. Glendining*, (t) it was determined that the circumstance of the plaintiff having received bills of exchange from the principal, under an agreement that he should not be precluded from proceeding in the action during the interval between the giving the bills and their arriving at maturity, did not discharge the bail; though, where the plaintiff had taken bills of exchange from the defendant, to which a surety was a party for payment of the debt by instalments, the court ordered the proceedings against the bail to be stayed, on the ground that as the defendant had procured a surety to accept bills payable by instalments at a future day, he had purchased the privilege of being exempt from personal interruption. (u)

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(r) *Brickwood v. Anniss*, 5 Taunt. 614. 1 Marsh, 250. s. c.

(s) Per Gibbs, C. J. *id.*

(t) 7 Taunt. 126.

(u) *Willison v. Whitaker*, 7 Taunt. 53.

## CHAPTER XV.

OF THE RIGHTS OF THE BAIL AGAINST THEIR PRINCIPAL,  
AND AGAINST EACH OTHER, AND OF A SURETY'S RIGHT  
AGAINST THE BAIL.

WHEN the accurate and regular manner in which the proceedings have been conducted preclude the bail from availing themselves of any of the grounds of discharge enumerated in the immediately preceding chapter, they will of course be compelled to fulfil the condition of the recognizance, by paying the amount stipulated in that security. (a) But as soon as this disbursement has been made, the bail may maintain an action of *indebitatus assumpsit* against the principal for money paid for the recovery of such sums, as they from their situation as bail, have been fairly and necessarily obliged to expend. (b)

Against the  
principal.

As the bail may surrender the principal in their own discharge, and for their own security, it follows as an attendant consequence, that if the principal absconds, and the bail incur expenses in sending after and securing him, to effectuate a surrender, such expenses may be recovered in an action for money paid against the principal; but they cannot recover costs which have been occasioned by their unadvisedly resisting the payment of the expenses so incurred. (c)

If one of the bail be compelled to pay the whole of the

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(a) Ante, p. 289.

(b) *Fisher v. Fallows*, 5 Esp. 171.

(c) *Fisher v. Fallows*, 5 Esp. 171. See F. N. B. 103. Fitz. Ab. Pledges 9. *Philip v. Biggs*, Hardres, 164. *Parsons v. Braddock*, 2 Vern. 608. *Duffield v. Scott*, 3 T. R. 374. *Merryweather v. Nixan*, 8 T. R. 186.

Right of  
bail against  
each other.

Right of  
sureties  
against bail.

debt created by the forfeiture of the recognizance, he may support an action for money paid against his co-surety, and thereby compel him to contribute his proportion towards the liquidation of the demand. (d)

Where the principal has given bail in an action for a debt with a surety, the surety, after paying the debt, has the same remedy in equity against the bail, as the bail have against their principal.

This was decided in the case of *Parsons and another v. Briddock*. (e) There the plaintiffs were bound as sureties for B. and had counter-bonds; B. was arrested; the defendant became his bail, and judgment was obtained against him. The sureties being afterwards forced to pay, brought their bill to have the judgment against the bail assigned to them, in order to reimburse themselves. And the Lord Chancellor observed, "The bail stand in the place of the principal, and cannot be relieved on other terms than on payment of principal, interest and costs, and the sureties in the original bond are not to be contributory."

This case is cited as an authority by the Master of the Rolls in the case of *Wright v. Morley*, (f) in the following terms: "The principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon, and paid; and it was held that he was entitled to an assignment of the judgment against the bail." "Consequently, that decision established, that the surety had precisely the same right

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(d) *Cowell v. Edwards*, 2 B. & B. 268. *Belldon v. Tankard*, 2 Marsh. 6.; and see *Turner v. Davies*, 2 Esp. 478. And see *Brand v. Boulcott*, 3 B. & P. 285., from which it appears, that if two of three bail are obliged to pay the whole of the debt, they cannot sue jointly, but must bring separate actions. As to the effect of giving a security instead of money, see *ante*, p. 22.

(e) 2 Vern. 608.

(f) 11 Ves. Jun. 23.

that the creditor had, and was to stand in his place. There are other cases establishing the same principle, though not quite so strong as that."

Rights of  
bail against  
each other.

In an action by one of the bail against his co-surety, to obtain contribution, he must prove the judgment as well as the execution. (g)

Rights of  
sureties  
against bail.

## CHAPTER XVI.

### OF THE ACTION FOR MALICIOUSLY HOLDING TO BAIL.

#### SECTION I.

##### IN WHAT CASES SUSTAINABLE.

A PERSON who has been maliciously holden to bail, without any reasonable or probable cause, may sustain an action for the recovery of a compensation in damages, against the party who instituted the proceedings. (a)

The existence of malice, either express or implied, and the absence of probable cause are essential; both must concur, or the plaintiff will be nonsuited. Whether certain substantiated acts will constitute a probable cause, is a mixed proposition of law and fact. (b) The circumstances alleged to shew whether the probability or not is true, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. (c)

The existence or absence of malice, is a question peculiarly within the province of the jury, and to be deter-

(g) *Belldon v. Tankard*, 1 Marsh. 6.

(a) *Skinner v. Gunter*, 1 Saund. 228. s. c. 1 Vent. 12. 18. *Daw v. Swaine*, 1 Sid. 424.

(b) *Johnstone v. Sutton*, 1 T. R. 520. 1 Wils. 232.

(c) *Ibid.*

In what  
cases sus-  
tainable.

mined by them alone, (d) It may either be established by direct evidence, or implied from the total want of probable cause; (e) as where it can be shewn that there was no legal debt whatsoever subsisting between the parties, (f) or the amount for which the plaintiff was holden to bail far exceeded the amount really due. (g) But the discontinuance of an action on a bill of exchange, in respect of which the party had been previously discharged by the laches of the plaintiff, is not sufficient to raise the presumption of malice, (h) or the omission to countermand the execution of a writ sued out before, but not acted upon till after the payment of the debt and costs; (i) or from suing out process, and arresting a party thereon after the debt had been discharged, and a receipt for the sum given; (k) or for arresting him for a less sum than is prescribed by law; (l) or from a judgment of *non pros* having been signed. (m) Where cross demands are separate and distinct, and A., to whom the larger amount is due, arrests B. for the balance only, and B. arrests A. for the smaller sum due to him, no action will lie for the latter arrest, though the court considered the conduct of B. highly vexatious and reprehensible, but that it did not afford sufficient grounds to support an action, as he had

(d) E. T. 4. Geo. 4, C. P. MS. See *Sinclair v. Eldred*, 4 Taunt. 7. Page v. Wiple, 3 East, 314. *Scheibel v. Fairbairn*, 1 B. & P. 388. *Gibson v. Chaters*, 2 id. 129. *Farmer v. Darling*, 4 Burr. 1971. *Turner v. Turner*, 1 Gow, 20.

(e) *Johnstone v. Sutton*, 1 T. R. 345.

(f) *Skinner v. Gunton*, 1 Saund. 228. 1 Vent. 12. 18. s. c.

(g) *Daw v. Swaine*, 1 Sid. 424. See *Wetherden v. Embden*, 1 Campb. 295.

(h) *Bristow v. Heywood*, 1 Stark. 48.

(i) Page v. Wiple, 3 East, 314. *Scheibel v. Fairbairn*, 1 B. & P. 388.

(k) *Gibson v. Chaters*, 2 B. & P. 129.

(l) *Jackson v. Burleigh*, 3 Esp. Rep. 34.

(m) *Sinclair v. Eldred*, 4 Taunt. 7. or taking a less sum out of court than the amount for which the plaintiff was holden to bail, is not sufficient to fix the defendant with full knowledge that the sum sworn to is not due. *Jackson v. Burleigh*, 3 Esp. 14.

not only probable cause, but a real cause against the plaintiff at the period of the arrest. (n)

In what cases sustainable.

Where A. sued B. by mistake, and on the officer demanding payment, the latter denied the existence of the debt, and the officer abstained from actually arresting him, the error was afterwards discovered, notice given to B. that he need give himself no further trouble on the subject, but the plaintiff, notwithstanding this notice, put in bail above, and incurred other unnecessary expenses; Lord Ellenborough, on these facts being disclosed, nonsuited the plaintiff, observing, "that the action could not be sustained, as no arrest or imprisonment had been proved, nor was there evidence of malice, and the plaintiff had suffered no inconvenience, except that which he had voluntarily brought upon himself." (o)

Where a party, acting under what he considers to be good and proper advice, causes another to be holden to bail, and the opinion given ultimately proves erroneous, the plaintiff cannot maintain an action against the defendant, unless it can be distinctly shewn that he was actuated by a malicious motive. (p)

A. having by his *laches* lost all right of action on a note endorsed by B., arrested B., and afterwards discontinued the action; these circumstances do not of themselves so exclude all probable cause, as to afford a presumption of malice. (q)

A detention in custody for the shortest interval of

(n) *Brown v. Pigeon*, 2 Campb. 593. See *Turlington's case*, 4 Burr. 1996. *Middleton v. Hill*, 1 M. & S. 242. 5 B. & A. 513.

(o) *Bieton v. Burrige*, 3 Campb. 139. An action cannot be supported for merely a malicious suit. See *Bird v. Line*, 1 Com. Rep. 190. *Robins v. Robins*, 1 Salk. 14. *Neal v. Spencer*, 12 Mod. 257.

(p) *Snow v. Allen*, 1 Stark. 502.

(q) *Bristow v. Heywood*, 1 Stark. 48.

In what  
cases sus-  
tainable.

time, is sufficient to enable the party to support an action. (r)

Where several persons may have conspired to procure the arrest of a party, the action is sustainable, although only one of them be found guilty. (s)

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## SECTION II.

### OF THE FORM OF ACTION.

THE appropriate remedy for a malicious arrest is an action on the case. (t) Trespass, it would seem, cannot be sustained. (u) There is no similitude between an action of trespass, and an action for a malicious arrest. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. The other is for an arrest, which, upon the stating of it is manifestly legal. (x) In *Belk v. Broadbent*, (y) Lord Kenyon said, "that an action of trespass could not be maintained, as it was incomprehensible to say, that a person who acts under process of the court is a trespasser."

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(r) *Bristow v. Heywood*, 4 Campb. 213. 1 Stark. 48. s. c.

(s) *Skinner v. Gunton*, 1 Saund. 228. s. c. 1 Vent. 12. 18.

(t) *Goslin v. Wilcock*, 2 Wil. 302. *Smith v. Cattle*, id. 376. *Morgan v. Hughes*, 2 T. R. 231. *Belk v. Broadbent*, 3 T. R. 185. *Daw v. Swayne*, 1 Mod. 4. *Robins v. Robins*, 1 Salk. 14.

(u) *Belk v. Broadbent*, 3 T. R. 185.

(x) *Johnstone v. Sutton*, 1 T. R. 544. 784.

(y) 3 T. R. 185.



## SECTION III.

## OF THE PLEADINGS.

THE venue in this action is transitory.

It has been usual in the commencement of the declaration, to recite that by the law of the realm, no person ought to be holden to bail for a debt under 15*l.*," &c. but as the statute, prohibiting an arrest for a claim under that amount, is a public and general act, its recital is injudicious and unnecessary. When this inducement is not inserted in the declaration, it at once states that the defendant falsely and maliciously caused and procured the plaintiff to be arrested. Declaration.

The word "falsely" or "wrongfully," has, however, been holden sufficiently expressive of a malicious intent. (z)

The writ under which the arrest was made must be accurately stated, (a) and the amount for which it was endorsed or marked for bail should be correctly described. In some of the precedents it is alleged, that the endorsement was made by virtue of an affidavit filed of record; but this allegation should be omitted, as it only incumbers the plaintiff with unnecessary evidence. (b) The day on which the arrest is stated to have been made is not material, nor is it necessary to state the exact period the party was detained in custody. (c) In an action for a malicious arrest in an inferior court that had

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(z) *Craft v. Boite*, 1 Saund. 242. a. n. *Harman v. Tappenden*, 1 East, 563.

(a) 1 H. Bl. 49. 1 T. R. 239. *Gadd v. Bennett*, 5 Price, 540.

(b) *Webb v. Herne*, 1 B. & P. 281.

(c) *Burton v. Heywood*, 1 Stark. 48. 4 Campb. 213. s. c.

Of the  
pleadings.  
Declaration.

no jurisdiction, an averment that the defendant knew that the court had no jurisdiction, does not appear requisite. (d)

It is essential to the validity of the declaration, that the final termination of the original suit should be shewn; otherwise, there might be two contradictory verdicts, (e) and that the result of the suit was in favour of the plaintiff. (f) An omission of this allegation would be fatal on demurrer, (g) though it would be aided after verdict. (h)

Hence, where a party moved in arrest of judgment, that the particular manner in which the suit ended was not properly shewn; the court decided, that if it was distinctly averred that the suit was terminated, it was unnecessary to state the manner. (i)

Where a declaration alleged that the defendant had no cause of action to the amount of 10*l.* against the plaintiff, and it appeared that the defendant had a larger demand against the plaintiff, but held him to bail for a much larger sum than was really due; Mr. J. Gould permitted the trial to proceed, and the plaintiff recovered a verdict; but the court subsequently set it aside, upon the ground that the plaintiff had not proved the injury complained of in his declaration. (k) Where it was averred that B., the defendant, had no cause of action against A., the plaintiff, to the amount of 10*l.*, and it appeared that the plaintiff was indebted to him in a larger amount, although not the

(d) *Goslin v. Wilcock*, 2 Wils. 302.

(e) *Robins v. Robins*, 1 Salk. 15. *Skinner v. Gunton*, 1 Saund. 228. *Fisher v. Bristow*, 1 Doug. 215. *Kirk v. French*, 1 Esp. 79. *Parker v. Langly*, 10 Mod. 209. Willes, 520. *Robins v. Robins*, 1 *Ld. Raymond*, 503. *Fisher v. Bristow*, 1 Doug. 215.

(f) *Parker v. Langley*, 10 Mod. 209.

(g) 2 Vin. Ab. Action case, 35. pl. 23.

(h) *Skinner v. Gunton*, 1 Saund. 228.

(i) 2 Chit. pl. 286. n. f., and *Bristow v. Heywood*, 1 Stark. 48. s. c. 4 Campb. 213.

(k) *Mawbey's case*, cited 1 Campb. 297.

sum sworn to in the affidavit to hold to bail ; it was decided, that the action could not be sustained, as A. should have declared against B. for maliciously holding to bail for a greater sum than was actually due ; but, if in fact B. was largely indebted to A. on a balance of accounts, and had only a cross demand upon him for a different cause from that mentioned in the affidavit to hold to bail, then the above averment is not to be falsified, as in that case A. did not owe B. 10*l.*, and B. had no cause of action for which he could lawfully hold A. to bail. (l)

Of the  
pleadings.  
Declaration.

The general issue is not guilty, under which any matter in justification may be given in evidence. As this is an action on the case, if it be not brought within six years next after the cause of action accrued, the statute of limitations may be pleaded in bar. (m)

Pleas.

## SECTION IV.

### EVIDENCE, DAMAGES, AND COSTS.

THE proof of malice, and the want of probable cause, it has been seen, are concurrent requisites to sustain the action ; of these facts, evidence must, therefore, be invariably adduced. The writ, the arrest, and the determination of the suit in which the writ was sued out, must be proved ; and the evidence of the other proceedings should uniformly correspond with the different allegations, and averments, in the declaration.

Evidence.

When it has been stated in the pleadings, " that the party was arrested under a writ endorsed for bail, by virtue of an affidavit now on record ;" the affidavit must be pro-

(l) *Wetherden v. Embden*, 1 Campb. 295. For Forms of Precedents, see *Petersdorff's Index*, 27. 193.

(m) 21 Jac. 1. c. 16.

Evidence,  
damages,  
and costs.

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Evidence.

duced, though the latter part of the averment was unnecessary. (a)

It is reported, that Lord Kenyon, at *nisi prius*, determined that it was not sufficient to prove the affidavit, the writ returned *cepi corpus*, and judgment of *non pros*; but that it was essential, in order to establish that the arrest was made under the defendant's writ, to prove the warrant. (b) This opinion, however, being inconsistent with the general rule, that the return of the sheriff upon a writ is evidence of the truth of the fact stated in the return, as well against the defendant as against the sheriff himself, (c) it is conceived that it is now untenable.

A rule of court, by which the defendant had leave to discontinue on payment of costs, together with proof that the costs were taxed and paid, is good *prima facie* evidence of the determination of the suit, as where there is merely a writ, followed up with a discontinuance, the judgment is not entered; (d) but, the production of the judge's order to stay proceedings upon payment of costs, and proof that the costs were actually paid, unsupported by other evidence, is not sufficient. (e) The averment of the suit having been discontinued, must be proved as laid; for where it was stated that the discontinuance was by the judgment of the court, &c. with reference to the record, evidence of a rule to discontinue was holden to be unavailable. Had the allegation of the discontinuing been general, it would have been sufficient to have

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(a) Webb v. Herne, 1 B. & P. 279. Arundel v. White, 14 East, 224.

(b) Lloyd v. Harris, Peake's Rep. 174. See Drake v. Sikes, 7 T. R. 113.

(c) Rex v. Elkins, 4 Burr. 2129. Blatch v. Archer, Cowp. 63. M'Neil v. Perchard, 1 Esp. N. P. C. 263. Jones v. Wood, 3 Campb. 229. Fairlie v. Birch, 3 Camp. 397.

(d) Birstow v. Heywood, 4 Campb. 214. 1 Stark. 48. s. c.

(e) Kirk v. French, 1 Esp. 80. Barton v. Mills, Ca. Temp. Hard. 125, 126., and see Goddard v. Smith, 1 Salk. 21. 6 Mad. 262. s. c.

produced the rule, and gave evidence of the payment of the costs. (*f*)

Evidence,  
damages,  
and costs.

An arbitrator, to whom a cause has been referred, cannot be called by the plaintiff to prove that there was no cause of action, and nothing due from him to the defendant, if the arbitrator examined the parties to the suit, or inspected the defendant's book. Lord Kenyon said he thought the arbitrator ought not to be permitted to disclose what transpired before him, either upon the examination of the parties themselves, or by an inspection of the books of the plaintiff (the defendant in the second action), upon the principle, that the parties themselves could not have been examined in the former cause, nor would the plaintiff be compelled at *nisi prius* to produce his books (*g*)

Evidence.

In estimating the damages, the costs incurred by the plaintiff should be calculated as between attorney and client. (*h*)

Damages.

But in *Bristow v. Heywood*, Lord Ellenborough said, "certainly the plaintiff cannot recover any damages for being held to bail, or for being compelled to pay the debt and costs into the hands of the sheriff."

Full costs are recoverable in the action, although the damages obtained are under 40s.

Costs.

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(*f*) *Gadd v. Bennett*, 5 Price, 540.

(*g*) *Habershon v. Troby*, 3 Esp. N. P. C. 38.

(*h*) 1 Stark. 306. See *Bristow v. Haywood*, 4 Campb. 213. and *Sinclair v. Eldred*, 4 Taunt. 7.

## CHAPTER XVII.

## OF BAIL ON THE REMOVAL OF CAUSES FROM INFERIOR COURTS.

## SECTION I.

## IN WHAT CASES BAIL IS REQUIRED.

ANTERIOR to the introduction of any legislative enactments on the subject, bail on the removal of causes from an inferior jurisdiction by *certiorari*, or *habeas corpus*, was in all cases required in the court above, with the exception of actions for words, or trifling assaults, or in suits against an executor or administrator. (a) And now, by the stat. 19 Geo. 3. c. 70. s. 6., (b) which prohibits an arrest for a cause of action under 10*l.*, it is provided, that no suit where the cause of action shall not amount to the sum of 10*l.* or upwards, (since extended to 15*l.* or upwards by the stat. 51 Geo. 3. c. 124. s. 3.) shall be removed or removeable into any superior court by writ of *habeas corpus*, or otherwise, unless the defendant shall enter into a recognizance in the *inferior court* to the plaintiff, with two sufficient sureties in double the sum due, for the payment of the debt and costs in case judgment shall pass against him. A similar recognizance is required by the stat. 34 Geo. 3. c. 58. on the removal of causes from any court of inferior jurisdiction into the Court of Common Pleas, at Lancaster, where the cause of action does not amount to the sum of 10*l.* and upwards.

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(a) Page v. Price, 1 Salk. 98. Lumley v. Quarry, id. 102. 2 Lord Raym. 767. s. c.

(b) Continued by 51 G. 3. c. 124. s. 3.

In what  
cases bail is  
required.

The practice adopted, in conformity with the apparent design of these enactments, appears to be, that where the cause of action does not amount to the sum of 15*l.*, or on a bill of exchange or promissory note, to 10*l.*, the defendant will not be obliged to put in *special* bail upon a *certiorari* or *habeas corpus* in the court above, as in actions for that sum the defendant could not have been arrested; but, if the subject matter of the suit be under 15*l.*, &c. he must enter into a recognizance, with two sureties, to the plaintiff in the court below, pursuant to the regulations in the stat. 19 Geo. 3. c. 70. s. 6.

## SECTION II.

### BAIL, WHEN AND IN WHAT MANNER PUT IN, EXCEPTED TO, AND JUSTIFIED.

ON the return of the *certiorari* or *habeas corpus*, if the defendant be in actual custody on mesne process, the court will not discharge him until bail above has been put in and perfected; it is, therefore, in such case adviseable, in order to accelerate the defendant's liberation from confinement, to put in and perfect bail below before suing out the writ. (c) But if he be not in actual custody when the *certiorari* or *habeas corpus* is returned, he must put in special bail if called upon so to do, and enter a common appearance in the superior court, according to the fact of the action beingailable, or non-ailable.

When put  
in.

The defendant ought not to be admitted to bail by the court below, after the *certiorari* or *habeas corpus* has been delivered. And, in the King's Bench, it is a rule that "no

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(c) Highmore on Bail, 115.

Bail, when  
and in what  
manner put  
in, excepted  
to, and jus-  
tified.

When put  
in.

bail shall be put in upon any writ of *habeas corpus* before the writ is returned, and that such bail shall not be taken by any justice of that court unless that writ, with the return thereof, shall be offered before the said justices to be filed, at the time of putting it in. (d)

At the return of the *certiorari* or *habeas corpus*, the plaintiff should obtain a rule or order from a judge for the defendant to put in bail within four days after notice of the rule, if in term; or in vacation, within six days after the notice was delivered. (e) No particular period is limited or prescribed, within which the plaintiff must obtain this rule; he is entitled to it at any time after the return of the writ. (f)

Bail may be put in, pending the rule, before a judge in town, a commissioner in the country, or a judge of assize on the circuit. (g) After the removal of person of the defendant from the King's Bench prison to the Fleet, bail may be put in, and justified in either court. (h) In the King's Bench they are taken on a bail-piece, which is annexed to the writ of *habeas corpus* and return, setting forth that the defendant is delivered to bail upon that writ, at the suit of the plaintiff or plaintiffs in the plaint; (i) but, in other respects, the practice is precisely the same, and regulated in the same manner as in ordinary cases. In the Common Pleas, the bail-piece contains a concise statement or abstract of the *habeas corpus*, with the names and additions of the bail, and the sum sworn to, and is filled up by the clerk of the dockets, who attends one of the

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(d) R. E. 29 C. 2. R. H. 10 W. 3.

(e) R. H. 10 W. 3. K. B. R. H. 13 & 14 Car. 2. C. P.

(f) *Clarke v. Harbin*, Barnes, 90.

(g) R. T. 8 W. 3. reg. 3. K. B.

(h) *Knowlys v. Reading*, 1 B. & P. 311.

(i) R. T. 8 W. 3. reg. 3. K. B.



judges, to put in the bail, or if necessary, to accept the tender of the principal. (k)

Bail, when and in what manner put in, excepted to, and justified.

When put in.

Immediately after bail have been put in, notice in writing should be served upon the plaintiff's attorney; and if it be not delivered before the expiration of the rule or judge's order, the act of putting it in will be nugatory.

After service of the notice of bail, the plaintiff is allowed twenty-eight days in the King's Bench, (l) or in the Common Pleas twenty days, (m) to except to them; and if he do not object to their insufficiency within that time, the bail-piece should be regularly filed by the defendant's attorney within four days afterwards, and they then become absolute and cannot be opposed.

Of excepting to the bail.

When the plaintiff is dissatisfied with the bail put in by defendant, and intends to except to them, he should obtain a rule or order from a judge for better bail. On this rule or order being served, and there being four days of the term unexpired, the notice of justification, and of adding and justifying new bail, must be given as in ordinary cases, and they must justify within the four days; but if the rule or order be served in vacation, it is sufficient for the defendant to give notice within the time allowed by the rule of an intended justification on the first day of the ensuing term. (n)

The bail justify in the same manner, and similar objections may be urged against their competency, and the regularity of the proceedings, as when they appear to justify in original causes.

Of justifying the bail.

If the persons who were bail in the inferior court offer to become bail in the Court of King's Bench, the plaintiff

(k) Imp. C. P. 704.

(l) R. M. 16 Car. 2.

(m) 13 & 14 Car. 2. C. P.

(n) 2 Sel. Prac. 272. 1 Tidd, 411. cites New Guide, K. B. 249.

Bail, when  
and in what  
manner put  
in, excepted  
to, and jus-  
tified.

Of justify-  
ing the bail.

is in general compellable to accept them, on the ground that he might have objected to them in the court below. But a different rule obtains, where a cause is removed from London; for the sufficiency of the bail in the Mayor's Court being at the peril of the clerk, renders it necessary that the bail should be opposed (o) by the plaintiff in the inferior jurisdiction, and consequently requisite and expedient that the property of the same bail, when offered in the court above, should be subject to scrutiny and investigation.

The indulgence of further time, to enable the parties to amend inaccuracies in the notice of bail, justification, &c. is never granted where a cause has been removed by *habeas corpus*; (p) and on account of the delay, (q) this rule is invariably enforced, except in cases of unavoidable accident, or where the bail are prevented from attending in consequence of unexpected indisposition, (r) and even where illness has been the cause of the non-attendance of the bail, time has been refused. (s) But the importance of the cause, and the production of an affidavit of merits, induced the judge, in a recent case, to relax the rule, it appearing that the absence of the bail had arisen entirely from mistake. (t)

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(o) Anon, 1 Salk. 97. See *Ormond v. Griffith*, Barnes, 63.

(p) *Rufford's bail*, 1 Chit. Rep. 76. *Thompson's bail*, E. T. 1822. MS. per Holroyd, J.

(q) Per Bayley, J., E. 55 Geo. 3. K. B.

(r) *Gwillim v. Howes*, 2 Chit. Rep. 107.

(s) *Small's bail*, E. T., K. B., 1823, per Holroyd, J. MS.

(t) *Harborow's bail*, E. T., K. B., 1823, per Best, J.

## SECTION III.

## OF THE LIABILITY OF THE BAIL, AND HOW DISCHARGED.

THE recognizance of bail in the King's Bench, on the removal of a cause from an inferior court, is general, that if the defendant be condemned at the suit of the plaintiff, in the plaint, he shall satisfy the costs and condemnation, or render himself to the custody of the Marshal. But, in the Common Pleas, it is taken in a penalty or sum certain, being double the amount of the sum sworn to, upon condition that the defendant do appear to a new original, to be filed within two terms; and that if he be condemned in the action, he shall pay the condemnation money, or render himself a prisoner to the Fleet; and, in that court, on a removal by *habeas corpus*, the original should, it seems, be shewn upon tendering the declaration if insisted on, and agree in the nature of the action, the sum in demand, and the county, otherwise the bail are not liable.

The responsibility of the bail upon a *habeas corpus* is commensurate with the number of actions specified in the return of the writ, wherein the plaintiff, or plaintiffs, shall declare within two terms. (u) But this rule is construed as applicable only to bail upon a *habeas corpus* before declaration; for it is said, that if the plaintiff have declared before the *habeas corpus* delivered, in one action which requires the *special* bail, and another wherein common bail is sufficient; the bail, shall be special only as to that which requires special bail and common as to the other. (x) On a removal of the cause after declaration, the bail are liable, though the plaintiff declare in a

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 (u) R. H. 2 Jac. 2. K. B.

(x) 2 Crompt. Pr. 428.

Of the liability of the bail, and how discharged.

*different* form of action in the court above from that which he had adopted in the inferior jurisdiction, provided it be for the same cause. (y)

Where a defendant, who has been sued in an inferior court, removes the action to a superior jurisdiction, and fulfils the preliminary condition of putting in and perfecting bail in the latter, the bail below are discharged; but, if the plaintiff remove it, the bail are exonerated unconditionally and *instanter*. (z)

#### SECTION IV.

##### CONSEQUENCE OF NOT PUTTING IN AND JUSTIFYING BAIL.

If bail be not put in and perfected in due time, a *procedendo*, on application to a judge at chambers, will be awarded. (a) This is a judicial writ, directed to the judges of the inferior court, commanding them to proceed in the cause, notwithstanding the writ before delivered to them, and from the moment it is served, removes the suspension created by the *certiorari* or *habeas corpus*. (b)

If the bail be put in after the expiration of the rule for that purpose, and before the *procedendo* is sued out, it seems, that a *procedendo* cannot be subsequently issued; hence the plaintiff in an inferior court, from which a cause is removed by *habeas corpus*, is not entitled to a *procedendo* after render of the defendant, and notice of such render, although it be made after the day on which the rule for better bail expires; (c) and where the

(y) 1 Wils. 277. (z) Taylor v. Shapland, 3 M. & S. 328.

(a) R. M., 1654, K. B. R. H. 13 & 14 Car. 2. C. P.

(b) Fazakerly v. Baldoe, 6 Mod. 177. 1 Salk. 352. Holt, 322. 335. s. c.

(c) Farquharson v. Fouchecour, 16 East, 387.

rule expired in vacation, a render on the first day of the ensuing term, *sedente curiá*, was deemed valid, although notice of that fact had not been given till a later hour on the same day, and after a writ of *procedendo* had issued to the inferior court, in which the cause had been originally commenced; (d) but where a rule for better bail had been served on the 14th, and the party did not justify until the 19th, the plaintiff was considered to be clearly entitled to a *procedendo*. (e)

Consequence of not putting in and justifying bail.

After service of the rule, for the allowance of bail, a *procedendo* cannot regularly be issued, on the ground of a defect in the proceedings, without first moving to set aside the rule for the allowance. (f)

A cause that has been sent back to the court below, by a writ of *procedendo*, can never afterwards be removed before final judgment; (g) it has, therefore, been determined, that proceedings against bail by *scire facias* cannot be removed from an inferior court, by which the original cause had been remanded by *procedendo*. (h)

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## CHAPTER XVIII.

### BAIL ON PROCESS OF OUTLAWRY.

At common law, and prior to the statute of 4 & 5 W. & M. c. 18. s. 4 & 5. a defendant, when taken by the

On the *capias utlagatum*.

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(d) *Wiggins v. Stephens*, 5 East, 533. 2 Smith, 242.

(e) *Davis v. Tuddenham*, 1 Chit. Rep. 130.

(f) *Rice v. Chambers*, 1 Chit. Rep. 575.

(g) *Horton v. Beckman*, 6 T. R. 760.

(h) *Dixon v. Heslop*, 6 T. R. 365. see 8 T. R. 152. 1 H. B. 631. 2 Campb. 396.

On the  
*capias utla-*  
*gatum.*

sheriff on a *capias utlagatum*, could not have been admitted to bail; (a) and it may be also remembered, (b) that by the statute 23 Hen. 6. c. 10 and 13 Car. 2. stat. 2. c. 2. s. 4., it is distinctly and expressly declared, that "no sheriff, &c. shall discharge any person or persons, taken upon any writ of *capias utlagatum*, out of custody, without a lawful *supersedeas*, first had and received for the same." But now, by statute of 4 & 5 W. & M. it is provided, "that if any person be outlawed and arrested upon a *capias utlagatum* in the King's Bench (other than for treason or felony) it shall be lawful for the sheriff (in all cases where special bail is not required) to take the attorney's engagement under his hand, to appear for the said defendant, to reverse the said outlawries, and thereupon to discharge the said defendant from such arrest."

"And in these cases, where special bail is required by the said court, the said sheriff shall and may take security of the defendant by bond, with one or more surety, in double the sum for which bail is required, and no more, for his, her, or their appearance by attorney in the said court, and to do and perform such things as shall be required by the said court, and after such bond taken, to discharge the defendant from such arrest."

"If any person outlawed, and arrested on a *capias utlagatum*, shall not be able, within the return of such writ, to give security as aforesaid (in cases where special bail is required) so as he or they are committed to gaol for default thereof; that whensoever the said prisoner or prisoners shall find sufficient security for his or their appearance to the sheriff, by attorney, at some return of the term then next following, to reverse the said outlawry, and to do and perform such thing or things, as shall

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(a) *Cracraft v. Gledowe*, 3 Burr, 1484. *Rex v. Wilkes*, 4 id. 2540.  
(q) *Vide ante*, p. 8.

be required by the said court, such sheriff shall discharge the defendant out of prison."

On the  
*capias utla-*  
*gatum.*

This act was introduced to regulate the practice, as well when no special bail is required, as where such security is necessary; and the sheriff, in either case, is expressly directed what course he is to pursue. When there is no affidavit of a bailable cause of action, it is obligatory on him to discharge the defendant, on an attorney's undertaking to appear and reverse the outlawry. But when an affidavit has been made, the defendant ought not to be released from custody, without giving the security required by the statute, which is not a bond subject to the same condition as an ordinary bail-bond, but a bond, with one or more sufficient sureties, for the appearance of the defendant, by his attorney, at the return of the *capias utlagatum*, and to do and perform such other things as shall be required by the court. (c) The words "other things" are construed to comprise putting in bail to a new action, pleading within a limited time, and placing the plaintiff as nearly as possible in the same situation as he would have been in, provided it had not been necessary to institute proceedings of outlawry. (d)

It is compulsory on the sheriff to accept a bond conditioned as above stated, whether the sum sworn to be regularly endorsed on the *capias utlagatum* or not; and if he be not satisfied as to the *quantum* of the debt, it is his duty to inquire of the filacer, before he discharges the defendant out of custody upon an attorney's undertaking; (e) but as the court have determined that process of outlawry is not within the statutes for preventing frivolous and vexatious arrests, it is not essential that the affidavit


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(c) *Cracraft v. Gledowe*, 3 Burr. 1488.

(d) *Rex v. Wilkes*, 4 Burr. 2540.

(e) *Cracraft v. Gledowe*, 3 Burr. 1482.

On the  
*capias utla-*  
*gatum.*



of debt should be filed before the *outlawry*; it is sufficient if there be an affidavit before the defendant is discharged. (*f*) A memorandum or copy of it is usually given to the officer in whose custody the defendant is detained.

The stat. 4 & 5 W. & M. c. 18. s. 4 & 5., it has been resolved, is confined to civil actions, and does not extend to criminal cases; at least it is perfectly clear, that misdemeanours after conviction are not within its provisions; (*g*) and even in civil actions, the defendant cannot be bailed where he was notailable upon the process on which he was outlawed, the design of the legislature being merely to put the defendant in the same condition as if he had not subjected himself to that proceeding; hence, when taken upon an outlawry after judgment, he cannot be discharged on bail. (*h*)

On reversing the outlawry.

Inailable actions, it is necessary that bail should be put in and perfected, before any proceedings are taken to reverse the outlawry. The stat. 31 Eliz. c. 3. s. 3. requires that the defendant in the original action shall put in bail, not only to appear and answer the plaintiff in a new action, to be commenced for the cause mentioned in the former, (*i*) but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of *two terms* next after allowing the writ of error, or otherwise avoiding the outlawry. On reversing the outlawry for any other error in law, besides the want of proclamation, it was for a considerable period a *verata questio*, whether the defendant should be obliged to put in special bail. In the earlier cases upon the subject, it was determined that

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(*f*) *Farmer v. Allen*, M. 10 Geo. 2.

(*g*) *Rex v. Wilkes*, 4 Burr. 2540.

(*h*) *Campbell v. Daley*, 3 Burr. 1930.

(*i*) See Cro. Eliz. 707.



he should give this security ;(k) but in *Serecold v. Hampson*,(l) the court, upon considering the words of the 4 & 5 W. & M. c. 18. s. 3., which, for the more speedy and easy reversing of outlawries in the Court of King's Bench, enacts, that "no person outlawed therein, for any cause, matter, or thing whatsoever, treason and felony only excepted, shall be compelled to come, or appear in person in the said court, to reverse such outlawry, but shall and may appear by attorney, and reverse the same, without bail in all cases, except where it shall be ordered by the said court," declared they were of opinion, that they had a discretionary power to require it, and that the want of an affidavit, before the outlawry, was no objection, because that was only requisite to warrant an arrest ; and though the 31 Eliz. c. 3. s. 3. be the only act that expressly requires bail, it is not to be inferred, that in other cases it ought not to be insisted on, for that act makes it a new ground of error, and the bail upon it are absolutely to pay the condemnation-money. And, consistently with this decision, it is now clearly settled, that on the reversal of an outlawry, for any other error in law, except the omission of the usual proclamation, the bail is common or special, according to the same rules as would have governed the original proceedings, if the defendant in the first instance could have been arrested.


Although in the case of reversing an outlawry upon the stat. 31 Eliz. c. 3., for want of proclamations, the recognizance of bail must be taken for the payment of the condemnation-money absolutely, yet it seems in all other instances that the common alternative form, to pay the

On reversing the outlawry.

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(k) *Matthews v. Erbo*, Carth. 459. 1 Ld. Raym. 349. c. s. *Wilbraham v. Doley*, 12 Mod. 545. 1 Ld. Raym. 591. 605. 2 Salk. 500. s. c.  
(l) 2 Stra. 1178. 1 Wils. 3. s. c. 12 East, 624. s. c.

On reversing  
the out-  
lawry.



condemnation-money, or render the principal, will be regular. The distinction which at one time existed between the terms of the recognizance, on reversing the outlawry, by motion, and by writ of error, is now repudiated. (m)

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(m) *Graham v. Grill*, 1 M. & S. 408. *Graham v. Henry*, 1 B. & A. 131. *Havelock v. Geddes*, 12 East, 622. *Hesse v. Wood*, 4 Taunt. 691. Sed vide cases collected in 12 East, 625. n. contra.

A

**PRACTICAL TREATISE**

ON

**THE LAW OF BAIL.**

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**PART THE SECOND.**

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**BAIL IN ERROR.**

**CHAPTER I.**

**IN WHAT CASES BAIL IN ERROR IS, AND IS NOT REQUISITE.**

**SECTION I.**

**STATUTES RELATING TO BAIL IN ERROR.**

As a writ of error is grantable *ex debito justitiæ* in all cases, except treason and felony; and as no bail in error was demandable at common law, a defendant, by removing the record by a writ of error, might formerly have delayed the plaintiff of his execution, without giving any security, either for the prosecution of his appeal in the superior court, or for the payment of the debt or damages recovered by the former judgment, in the event of its being affirmed, or the writ of error being discontinued, or the plaintiff in error, from other causes, failing in his appeal.

The evils attending this facility of obtaining a delay of execution, became at a very early period of our jurisprudence, sufficiently manifest to induce the legislature to

Statutes re-  
lating to  
bail in error.

interpose, who, by successive enactments, have, in most cases, directed that bail in error must be duly put in, or the writ of error shall not operate as a *supersedeas* of execution in the original action (a)

In examining this division of the law of bail, it is intended to enumerate and recite the different statutes on the subject, the construction they have received, and their general effect; and then to state in what cases bail in error is or is not required; 1st, In actions in form *ex contractu*; and 2dly, In actions in form *ex delicto*.

Stat. 3 Jac.  
1. c. 8.  
made per-  
petual by  
3 C. 1. c. 4.  
s. 4.

The statute 3 Jac. 1. c. 8. made perpetual by 3 C. 1. c. 4. s. 4. enacts that no execution shall be stayed or delayed, upon or by any writ of error or *supersedeas* thereupon to be sued for the reversing of any judgment, in any action or bill of debt, upon any single bond for debt, or upon any obligation, with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contracts sued in any of the courts of record at Westminster, or in the counties palatine of Chester, Lancaster or Durham, or the courts of Great Session in Wales, nor (by statute 19. Geo. 3. c. 70. s. 5.) for the reversing of any judgment given in any inferior court of record, where the damages are (b) under 10*l*. since ex-

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(a) In *Johnes v. Johnes*, 1 Dow. P. C. 22. Lord Eldon, C. said "He had now been there for twelve years attending to writs of error, and he found that not more than one in fifty was argued, so that forty-nine out of fifty were brought for delay. Delay was one of the greatest mischiefs in the administration of justice; and as far as that could be avoided by giving exemplary costs, their lordships would be disposed to check it."

(b) Mr. Serjeant Williams, 2 Saund. 101. n. (i) in reciting this statute, adds, "that is as it is conceived where the damages laid in the declaration." And Mr. Tidd, when reciting this statute, adds a "*Quære*, as to the damages here referred to, whether they are the damages laid in the declaration, or the damages recovered; and if the latter, whether they are with or without costs." It may perhaps be correctly inferred, from the uniform definition of the term damages, that the legislature intended the sum actually recovered, exclusive of the costs. See Co. Lit. 257. 10 Co. 116. For the difference between damages and costs, see 1 Salk. 209. 6 Mod. 157. Gilb. Eq. Rep. 195.

tended by the 51 Geo. 3. c. 124. s. 3., to 15l., unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court, wherein the judgment is given, shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance, to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay, if the said judgment be affirmed (or the writ of error non-prossed, 19-Geo. 3. c. 70. s. 5.) all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for delaying execution.

Statutes relating to bail in error.

Stat. 3 Jac. 1. c. 8. made perpetual by 3 C. 1. c. 4.

This stat. of 3 Jac. 1. c. 8. was extended to other actions, by that of 13 C. 2. stat. 2. c. 2. s. 9. which enacts, that no execution shall be stayed in any of the courts aforesaid, (the courts which are mentioned in the statute 3 Jac. 1. c. 8.) by any writ or writs of error or *supersedeas* thereupon, after verdict and judgment in any action of debt, grounded upon the stat. 2 Ed. 6. for not setting forth tithes, nor in any action upon the case, upon any promise for payment of money, actions *sur trover*, actions of covenant, detinue, and trespass, unless such recognizance, and in such manner as by the said act of 3 Jac. 1. is directed, shall be first acknowledged in the court where the judgment is given. And by statute 16 & 17 Car. 2. c. 8. s. 3. (made perpetual by statute 22 & 23 Car. 2. c. 4.) no execution shall be stayed in any of the aforesaid courts (mentioned in 3 Jac. 1) by writ of error or *supersedeas* thereupon, after verdict and judgment, in any action personal, (c)

Extended by stat. 13 C. 2. st. 2. c. 2. s. 9.

Stat. 16 & 17 Car. 2. made perpetual by 22 & 23 Car. 2.

(c) A *scire facias* against bail is a personal action within the meaning of this act, 2 Wm. Bl. 1227.

Statutes relating to bail in error.

Extended by stat. 13 C. 2. st. 2. s. 9.

whatsoever, unless a recognizance, with condition according to the statute 3 Jac 1, shall be first acknowledged in the court, where such judgment shall be given. And further, that in writs of error, to be brought upon any judgment after verdict, in any writ of dower, or in any action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon, or after such judgment affirmed, discontinuance or nonsuit. And by section 4. it is provided, that the court, wherein such execution ought to be granted upon such affirmation, discontinuance or nonsuit, shall issue a writ to inquire, as well of the mesne profits, as of the damages, by any waste committed after the first judgment in dower, or in *ejectione firmæ*; and upon the return thereof, judgment shall be given and execution awarded for such mesne profits and damages, and also for costs of suit. But section 5. enacts, that the act shall not extend to any writ of error, to be brought by any executor or administrator; nor unto any action popular, nor unto any other action upon any penal law or statute, except actions of debt, for not setting forth tithes, nor to any indictment, presentment, inquisition, information, or appeal.

In ejectment, 1 G. 4. c. 87.

In ejectment by a landlord against a tenant, on the stat. 1 Geo. 4. c. 87. where a recognizance shall have been entered into pursuant to the provisions of that act, not to commit any waste, &c. it is provided, that "such recognizance shall immediately stand discharged, and be of no effect, in case a writ of error shall be brought upon

such judgment, and the plaintiff in such writ shall become bound with two sufficient sureties unto the defendant, in such sum, and with such condition, as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment, by an act passed in England in the seventeenth and eighteenth years of the reign of King Charles the Second, and by an act passed in Ireland in the seventeenth and eighteenth years of the reign of the same King, which acts are respectively entitled, "An act to prevent arrests of judgment and superseding executions."

Statutes relating to bail in error.

In ejectment,  
1 Geo. 4.  
c. 87.

In construing these acts, some diversity of opinion has existed. In *Chauvet v. Alfray*, (d) it was stated, as the ground of the decision in that case, that the stat. 3 Jac. 1. c. 8. is a remedial law, and ought to be construed liberally for the benefit of the party, whose execution might otherwise be stayed by the writ of error; but, in *Bidleson v. Whytel*, (e) it was holden, that the statutes were introductive of a new law in restraint of the remedy by writ of error, and, therefore, ought rather to receive a literal than an extended interpretation, and ought not to be enlarged by equity to cases out of the letter of it. The law on the subject, however, has been sufficiently marked out and defined by the decisions, to render the absence of uniformity in the mode of construing the acts comparatively unimportant.

Construction of the statutes.

The obvious intention of requiring bail in error being to prevent an unnecessary interruption of the course of justice, the statutes are necessarily confined to cases

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(d) 2 Burr. 746. *The Dean and Chapter of St. Paul's v. Capel*, 1 Lev. 117. 1 Keb. 613. s. c. *Ablett v. Ellis*, 1 B. & P. 249  
(e) 3 Burr. 1549.

Statutes relating to bail in error.

Construction of the statutes.

where judgment has been given for the *original plaintiff*, and do not apply to such as have been obtained for the defendant in the court below. (f) And where it was given in the latter case by mistake, a rule was granted to discharge the recognizance. (g) On analogous principles, it has been determined, that the statutes do not affect the proceedings by writ of error, *coram nobis*, or *vobis*, which is or is not a *supersedeas*, according to circumstances, as an execution cannot be issued pending it without obtaining the previous leave of the court. (h) A respectable writer on the practice of the courts, (i) has stated, that if a writ of error be brought in the same court, after abatement or discontinuance of a writ of error, *coram nobis*, or *vobis*, no bail is requisite, because none was required on the former writ of error; but this, it has been observed, (k) must be understood to mean, where the second writ of error abates by the act of God, or of the law; for where a writ of error *coram nobis* is quashed in the King's Bench for insufficiency, it is not of itself a *supersedeas*.

Under such circumstances an application should be made to the court for an order, that upon the plaintiff in error putting in and justifying bail within four days, further proceedings shall be stayed on the judgment in the original action until the writ of error be determined; (l) and a similar order may be obtained when a second writ

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(f) *Cone v. Bowles*, 4 Mod. 7, 8. 1 Show, 13. 165. s. c. 1 Salk. 93. 205. s. c. Comb, 100. s. c. *Baring v. Christie*, 5 East, 545. 2 Smith, 142. *Golding v. Dias*, 10 East, 2.

(g) *Freeman v. Garden*, 1 D. & R. 184.

(h) Carth. 368, 9. *Birch v. Triste*, 8 East, 412.

(i) 2 Crompt. Pr. 396.

(k) 2 Tidd, 1196.

(l) *Walker v. Stokoe*, 1 Lord Raym. 151. Carth. 368. s. c. *Cooper v. Ginger*, Stra. 606; 8 Mod. 316. 2 Ld. Raym. 1403. s. c. *Birch v. Triste*, 8 East, 412.



of error is quashed for insufficiency, or upon a writ of error *coram nobis*, for error in fact. (m)

Statutes relating to bail in error.

Construction of the statutes.

Where a judgment in the Common Pleas is affirmed in a writ of error in the King's Bench, or a judgment in the King's Bench is affirmed in the Exchequer Chamber, new bail must be given on bringing a writ of error in Parliament; although bail was put in on the first writ of error; (n) and in the amendment of a writ of error, bail must be given to the corrected writ, in cases where bail would otherwise have been requisite. (o)

In considering the general effect of these statutes, it will in all cases be important to remember, that the act 3 Jac. 1. c. 8. extends only to the particular forms of actions expressly specified in its provisions; (p) and that in those actions bail in error must be given on every species of judgment, whether it be after verdict, by default, upon demurrer, or *nul tiel* record; and that the enactment in the 16 & 17 Car. 2. c. 8. although general, and not confined to any particular forms of personal actions, do not require bail unless where the judgment has been after verdict; hence upon judgment by default, upon demurrer, or *nul tiel* record, a writ of error is a *superseas* without bail in such actions as are not specifically enumerated in 3 Jac. 1.

(m) Walker v. Stokoe, Carth. 370. s. c. 1 Ld. Raym. 151.

(n) Tilly v. Richardson, 1 Salk. 97. 2 Ld. Raym. 840. s. c. Colebrooke v. Diggs, 1 Stra. 527. 8 Mod. 79. s. c.

(o) 2 Wm. Bl. 1067.

(p) See Vernat v. Debuste, 2 Keb. 234.

## SECTION II.

IN ACTIONS IN FORM *EX CONTRACTU* AND IN FORM *EX DELICTO*.

With a view of simplifying the subject, it will be proper to premise, that where it is stated in general terms that bail in error is not required, the observation must be understood as only applicable to judgments by default, or judgments upon demurrer, or *non tunc* record, and not to cases where a writ of error is brought after verdict.

In form *ex contractu*.

In *assumpsit*.

As the operation of the statute 3 Jac. 1. c. 8. is limited and confined to actions of debt, bail in error is not required under the provisions of this act in an action of *assumpsit*; (q) and in the latter form of action such security can only be obtained on judgments *after verdict* under the stat. 13 Car. 2. st. 2. c. 2. s. 9.

In debt.

In examining the effect of the words, "any action or bill of debt, upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract as in the statute of James," it will conduce to a perspicuous elucidation of the subject to classify the different heads of contracts, and assign to each a distinct inquiry.

On a single bond.

A single bond, which is an obligation without a condition, (q) is, by the express language of the act, included within its provisions.

On a bond, conditioned for the payment of money.

In actions of debt on bond, conditioned for the payment of *money only*, the statute has been construed to extend as well to cases where the sum was originally unde-

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(q) *Vernat v. Debuste*, 2 Keb. 131. *Garrett v. Dandy*, 1 Show. 15.

financed and contingent, but afterwards reduced to a certainty, as to cases where the sum was originally certain, and payable absolutely by the condition, without reference to the happening of any particular event or collateral security. Thus, it has been decided, that bail in error is required in an action on a bottomry-bond; for though the money may have originally been payable upon a contingency, as soon as the contingency occurred the amount became certain and specific; (s) or on a bond, conditioned to pay so much money as J. S. should declare to be due upon an account stated between the plaintiff and defendant; (t) or on a bond, conditioned to pay by instalments, a composition upon the total and ascertained amount of a third persons' debts. (u)

And the obligation having been entered into as a collateral security, to ensure the payment of a specific sum of money, stipulated to be paid in another contract, will not affect the right to bail in error; (x) as where a bond was conditioned for the payment of money, according to the true intent and meaning of an indenture; or conditioned for the payment of 300*l.*, mentioned in a surrender of a copyhold by way of mortgage. (y)

In actions  
form *ex*  
*contractu*.

In debt  
on a bond,  
conditioned  
for the pay-  
ment of  
money.

On a bond  
payable on  
a contin-  
gency

(s) *Pitt v. Coney*, 1 *Stra.* 476. *Scot v. Brace*, 6 *Mod.* 38. The case of *Garrett v. Dandy*, 1 *Show*, 16. *Comb.* 105. s. c. is usually cited, as being contrary to the position in the text; but, it will be found on examination, that in the latter case the bond was not only conditioned for the payment of the money on the return of the ship, but to perform covenants and agreements in another instrument. See 7 *T. R.* 450.

(t) *The Dean and Chapter of St. Paul's v. Capell*, 1 *Lev.* 117. 1 *Keb.* 613. s. c.

(u) *Chauvet v. Alfray*, 2 *Burr.* 746. See *Thrale v. Vaughan*, 2 *Stra.* 1190. 1 *Wils.* 19. s. c., where, on a bond, conditioned to pay for so much beer as the obligee should deliver to J. S. not exceeding 100*l.*; the Court of King's Bench, after judgment upon demurrer, held that no bail was necessary.

(x) *Descordes v. Horsey*, 2 *Stra.* 959. 2 *Barnard, K. B.* 389. 2 *Keb.* 181. pl. 147.

(y) *Woods v. Armstrong, Barnes*, 78. *Littleton v. Hanson*, id. 98.

In actions in  
form *ex*  
*contractu*.

In debt  
on bond.  
To perform  
covenant.

The statute, however, does not extend to actions of *debt* on bond, conditioned for the performance of covenants in another deed; even though one of the covenants be for the payment of a fixed and definite sum, and the action be brought for the non-performance of that identical covenant. (z) This distinction may, perhaps, be thus correctly stated: When it is either express or apparent that the covenant for the payment of money is the sole covenant in the indenture referred to, bail in error must be given; but where other acts are stipulated to be fulfilled, and the bond is conditioned as well for the performance of such covenants as the payment of the money, bail will not be required. (a)

To perform  
an award.

Consistently with the preceding rule, a bond conditioned to perform an award, is obviously not within the act.

To indem-  
nify.

Nor is a general bond to indemnify; (b) as where it was conditioned to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages, and costs, which should be brought against him, or that he might sustain by reason of the non-payment of the money: it was holden not to be a security for the payment of money only, within the statute of James. (c) Though where a principal had given a bond to his surety, conditioned to pay the money for which the latter had become responsible; it was holden, that an action of debt on such a bond, bail in error was necessary. (d)

Bail-bond.

As a bail-bond contains an alternative condition, either that the principal shall appear, or the obligor will pay the

(z) *Callwood v. Ballard*, 2 Keb. 131. *Garrett v. Dandy*, 1 Show, 15.

(a) 2 Bulst. 54. Carth. 28. *Butler v. Brushfield*, 10 East, 407. See 2 Crompt. Pr. 363.

(b) *Garrett v. Dandy*, 1 Show, 15.

(c) *Flanagan v. Watkins*, 1 B. & C. 316. 2 D. & R. 459. s. c.

(d) *Huddy v. Gifford*, 1 Com. 34. See *Hammond v. Webb*, 10 Mod. 281. contra.

money ; bail in error is not necessary in actions on these instruments. (e)

In actions in form *ex contractu*.

A mortgage deed, containing a covenant for the repayment of the principal money, is a contract within the statute, in respect of which bail in error is required. (f)

In debt on a mortgage deed.

So by the express language of the act, it must be given in an action brought for the recovery of rent.

In an action for rent.

But in debt, upon an award, where the arbitrators have directed several disputed matters to be settled by the payment of a specific and liquidated sum ; it is reported to have been adjudged, that bail in error need not be put in. (g)

On an award.

Nor is it necessary to give bail in an action, upon a recognizance of bail, as that security is in the alternative to pay the money, or render the body of the principal ; (h) nor is bail requisite, upon an award of execution on a recognizance of bail in error. (i)

On a recognizance of bail.

Although bail may have been proper in the original action, yet it is not requisite upon bringing a writ of error in an action of debt, founded upon a prior judgment. (k) The reasons for this rule have been thus expounded : 1st, That the contract is *extinguished* by the first judgment. 2dly, That a judgment is no contract, nor to be considered in the light of a contract for *judicium redditur in invitum*. 3dly, That an action of debt upon a judgment, is an action of a superior nature to an action of debt upon a bond, or any of the other actions particularly specified in the statute. 4thly, That it is a *casus*

On judgments.

(e) *Valentine v. Dennis*, Ca. Prac. C. P. 7.

(f) *Buckney v. Metham*, 3 Taunt, 382. In this case, Mansfield, C.J., said, It is impossible to contend that a covenant is not a contract.

(g) *Gilling v. Baker*, 2 Bulst. 53. Yelv. 227. s. c. See *Garrett v. Dandy*, 1 Show, 15. 1 Lev. 117. Comb, 105. s. c. *Evans v. Roberts*, 3 Salk. 147.

(h) *Trinder v. Watson*, 3 Burr. 1566. *Dell v. Wild*, 8 East, 240.

(i) *Anon. Barnes*, 194, 5.

(k) *Bidleson v. Whytel*, 3 Burr. 1549. 1 Blac. Rep. 506. s. c.

In actions in  
form as  
contracts.

In debt  
on judg-  
ments.

*omissus*, and the act is not to be extended by construction, because actions of debt, on judgments, are in general oppressive. (l)

Upon nearly similar grounds, it was holden, in *Sparkes v. O'Kelly*, (m) that where a writ of error is brought upon a judgment on which a *scire facias* has been sued out, pursuant to the stat. 8 & 9 W. 3. c. 11. s. 8., bail in error is not required; for though it is not an action upon a judgment, yet it is a proceeding issuing out of one, and is clearly within the reason and meaning of the decisions upon judgments.

After judgment by default in an action upon an Irish judgment, bail in error is not necessary; such a case not being distinguishable from actions on English judgments. (n)

On simple  
contracts.

The words "upon any other contract" have received a limited and circumscribed construction. Every transaction is excluded from the operation of the statute, when it was not originally a specific contract (o) for the payment of an exact and stipulated sum, at a certain time; therefore, bail in error is not necessary upon a judgment for goods sold and delivered, or for money paid, money lent, money had and received, or on an account stated. (p)

(l) 3 Burr. 1549. (m) 1 Taunt. 168.

(n) *Parkins v. Stewart*, 9 Price, Ex. 1.

(o) *Ablett v. Ellis*, 1 B. & P. 249.

(p) *Gilling v. Baker*, 2 Bulst. 53. *Yelv.* 227. s. c. *Evans v. Roberts*, 3 Salk. 147. *Alexander v. Biss*, 7 T. R. 449. *Trier v. Bridgman*, 2 East, 359. *Webb v. Geddes*, 1 Taunt. 540. In the case last cited, Mansfield, C. J. observed, "The cases decided (for what reason I cannot perceive) that the count for goods sold and delivered is not an action upon a contract, and we must abide by the decision. We can only look at the record; we cannot examine whether the evidence to support the count is evidence of an express, or of an implied contract. Besides, if that were a count upon a contract; yet, it has been determined, that where there is a general judgment, and one of the counts is not upon such a contract, on which debt would lie at the time of passing of this statute (3 Jac. 1. c. 8.), bail in error cannot be required upon the single count."

And the statute is confined to such contracts as were recognized as valid securities, and capable of being enforced by action of debt, at the time of the passing that act; and, consequently, as the validity of promissory notes was not established until after that period, bail in error, in actions on these instruments, cannot be demanded. (q) But in debt, on a foreign or inland bill of exchange, by the payee against the drawer, (r) or by the first indorsee against the first indorser, (s) when it is expressed to be for value received, and there is no other count in the declaration on another simple contract, bail in error must be put in. (t) As debt, however, is not sustainable on a collateral engagement; (u) bail need not be given in an action by the payee against the acceptor, or where there is no privity between the parties, as by an indorser against the drawer. (x)

In actions in form *ex contractu*.

Debt on simple contracts.

In penal actions, bail is not required even after verdict, except on 2 Ed. 6. for not setting out tithes.

On penal statutes.

It remains to be observed, that the injudicious joinder of counts, in the declaration, will deprive the defendant in error of the benefit of his security; it being a rule, that if any one of the counts upon which judgment has been entered, be not within the meaning of the statute of James, the plaintiff in error will not be compellable to find bail; (y) hence, in action on a common money bond,

Where there are several counts in the declaration, on different contracts.

(q) *Trier v. Bridgman*, 2 East, 359. *Webb v. Geddes*, 1 Taunt. 540.

(r) *Bishop v. Young*, 2 B. & P. 82, 83, 84. *Hodges v. Steward*, 2 Show, 236. n.

(s) *Straton v. Hill*, 3 Price, 253. *semb. s. c.* 2 Chit. Rep. 126.

(t) *Ablett v. Ellis*, 1 B. & P. 249. *Trier v. Bridgman*, 2 East, 359.

(u) *Anon. Hardres*, 486. *Purslow v. Baily*, 2 Ld. Raym. 1040. *Hodsdon v. Harridge*, 2 Saund. 63. b.

(x) *Bishop v. Young*, 2 B. & P. 80. *Simmonds v. Parmenter*, 1 Wils. 185. *Browne v. London*, 1 Mod. 285. *Anon.* 13 id. 345. *Webb v. Geddes*, 1 Taunt. 540. 2 Campb. 187. n. *Com. Dig. tit. Debt, B. 1.*

(y) *Trier v. Bridgman*, 2 East, 359. *Webb v. Geddes*, 1 Taunt. 540.

In actions in  
form *ex*  
*contractu*.

  
In covenant.

In actions by  
executors,  
&c.

the insertion of the money counts and accounts stated, is  
unadvisable.

After judgment by default, bail in error in an action of  
covenant is not demandable.

In construing the provision in the stat. 16 & 17 Car. 2:  
c. 8. (z) that "it shall not extend to any writ of error, to  
be brought by any *executor* or *administrator*, nor unto any  
action popular, or other action brought upon any penal  
law or statute, except actions of *debt* for not setting forth  
tithes, nor to any indictment, presentment, inquisition,  
information, or appeal," it has been determined, that if  
judgment be given against an executor or administrator  
*de bonis propriis*, he shall put in bail in cases where it  
would be required of other persons; (a) and, although  
an executor or administrator is not compellable to find  
bail in error; yet if he does not avail himself of his  
privilege, but puts in bail, the recognizance will be valid  
and obligatory. (b)

How shewn  
to the court  
that bail is,  
or is not  
necessary.

When the nature of the action is not sufficiently dis-  
closed on the face of the record, to enable the court to  
determine whether bail in error is or is not necessary, ex-  
planatory affidavits will be admitted, on which the question  
will be decided. (c) Where bail in error are put in unne-  
cessarily, on applying to stay proceedings, they must un-  
dertake for the payment costs of the writ of error. (d)

### *In actions in form ex delicto.*

It is an indisputable proposition, that the statute of  
3 Jac. 1. does not affect actions founded in *tort*; and that

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(z) Ante, 450.

(a) *Fitzwilliams v. More*, 1 Lev. 245. 1 Sid. 368. 2 Keb. 295. 371. s. c.

(b) *Johnson v. Laserre*, 2 Ld. Raym. 1459. 2 Stra. 745. s. c.

(c) *Bennet v. Aylet*, T. T. 32 Geo. 3. cited Imp. K. B. 769. *Spinks v. Bird, Barnes*, 72. *Ablett v. Ellis*, 1 B. & P. 249.

(d) *Ritson v. Francis*, 2 Stra. 877. *Barnard*, K. B. 373. s. c.



the right to bail in error in actions *ex delicto*, is only derived from the 13 Car. 2. stat. 2. c. 2. s. 9., and 16 & 17 Car. 2. c. 8., which it has been seen is expressly confined to judgments after verdict; and, therefore, in trespass, trover, detinue, &c. unless a verdict has been obtained, the successful party is left without security, as at common law.

In actions  
in form *ex  
delicto*.

The security required by the 16 & 17 Car. 2. c. 8. s. 3., and 1 Geo. 4. c. 87., has been already stated. (e)

## CHAPTER II.

### WHO MAY BE BAIL, AND IN WHAT AMOUNT REQUIRED; AND OF PUTTING IN AND JUSTIFYING BAIL IN ERROR.

THE qualifications of bail in error, and the causes creating an incompetency, are the same as in the original action, and the persons who were bail in such action, may become bail in error, provided they are in other respects qualified; (a) though, as the party has no security in error but the bail, and as they are not liable for the person of the principal, but only for the actual payment of the debt, the court, in order to prevent fraud and imposition, by putting in *sham* bail, will allow them to be treated as a nullity; and in *Ward v. Levi*, they discharged a rule for setting aside an execution which had been obtained under such circumstances, with costs. (b)

Who may  
be bail in  
error.

(e) Ante, p. 450. (a) *Martin v. Justice*, 8 T. R. 639. In *Colebrooke v. Diggs*, 1 Stra. 527. *Tilly v. Richardson*, 1 Salk. 97. 2 Ld. Raym. 840., it is said, that upon a writ of error returnable, in parliament, new bail must be put in. But it is evident from the whole context, that by new bail it was only meant, that bail must justify again upon the second writ of error, the former bail in error not being considered an undertaking on the second writ of error.

(b) 1 B. & C. 268. 2 D. & R. 421.

Who may  
be bail in  
error, and  
in what  
amount re-  
quired.

In what  
amount re-  
quired in  
personal  
actions.

The expression *with sureties*, in 3 Jac. 1. c. 8., is construed to mean *by sureties*; it is therefore unnecessary, and in practice unusual, for the plaintiff in error to join in the recognizance. (c)

In *personal* actions the recognizance is acknowledged in *double* the amount adjudged to be recovered by the former judgment; and a recognizance of bail in error, for a less sum than double the amount recovered by the judgment, does not operate as a *supersedeas*, or suspend the execution; (d) nor will the court permit the bail-piece to be amended, by enlarging the penalty in order to defeat the execution. (e)

In an action of debt on bond in the King's Bench, the preceding rule appears to obtain; (f) though it is to be remarked, that in a prior case, it was said by the court, that notwithstanding the bail are to be bound in double the penalty recovered, yet, by the practice of the court, it is sufficient if they justify in double the sum really due. (g)

In the Common Pleas, in error on a judgment of debt on bond, the recognizance may be taken in double the amount of the sum recovered, exclusive of any interest, costs, or nominal damages. (h)

In the Exchequer it is a rule, (i) that "in all cases where special bail is required on writs of error, if the bail are obliged to justify, each of them shall justify himself, in double the sum recovered by the judgment on which the writ of error is brought; except where the

(c) Dixon v. Dixon, 2 B. & P. 443.

(d) Reed v. Cooper, 5 Taunt. 320. Phillipson v. Browne, 2 Chit. Rep. 105.

(e) Id.

(f) Phillipson v. Browne, 2 Chit. Rep. 105.

(g) Serra v. Munez, 2 Stra. 821. 1 Wils. 213.

(h) Dixon v. Dixon, 2 B. & P. 443.

(i) R. E. 33 Geo. 2. 12 Man. Ex. App. 217.

penalty of a bond, or other specialty, is recovered by such judgment; in such case each of the bail shall justify in such penalty only."

Who may be bail in error, and in what amount required.

In what amount required in ejectment.

In ejectment, the plaintiff in error may either enter into a recognizance himself, pursuant to the statute 16 & 17. Car. 2. c. 8. s. 3. or he may procure two responsible persons to become bail; for, though the language of the act would appear to render it necessary for the plaintiff in error to be personally bound, it has, by a reasonable construction, been holden sufficient, if he procure proper sureties, to enter into the recognizance of bail; for otherwise, lessors residing in distant counties would sustain great inconvenience, and an infant lessor, or a lessor becoming a feme covert after action brought, would be entirely excluded from the benefit of the security intended to be given by the legislature. (*k*)

The sum in which the plaintiff in error is bound under this statute, is generally, in the King's Bench, double the improved rent of the premises in dispute, and the single costs of the ejectment; (*l*) but in the Court of Common Pleas, the clerk of the errors is guided in fixing the penalty of the recognizance by the amount of the rent of the premises, and takes the recognizance in two years rent or profits, and double costs. (*m*) In the Exchequer, each of the bail are required to justify in double the improved annual rent, or value of the premises recovered. (*n*)

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(*k*) Barnes v. Balmer, Carth. 121. Lushington v. Dose, 7 Mod. 304. Keene d. Lord Byron v. Deardon, 8 East, 298. See 4 Taunt. 289.

(*l*) Thomas v. Goodtittle, 4 Burr. 2501. Keene d. Lord Byron v. Deardon, 8 East, 298. See. Ca. Temp. Hard. 374.

(*m*) Roe d. Fenwick v. Pearson, Barnes, 103. Doe d. Webb v. Goundry, 7 Taunt. 427. 1 B. Moore. 118. s. c.

(*n*) R. E. 38 Geo. 2. Mang. Ex. Prac. App. 217.

## SECTION II.

## OF PUTTING IN AND JUSTIFYING BAIL IN ERROR.

Within  
what time.

THE period within which bail in error must be put in, is regulated by the fact of the writ of error having been sued out *before* or *after* final judgment. When it is issued *before* judgment, the bail should be put in within four clear days after signing final judgment; as if it be signed on Monday, the plaintiff in error will have all Friday to put in bail, and in default of his doing so, the defendant cannot sue out execution until Saturday. (o) When it is issued *after* final judgment, the plaintiff has four clear days to put in bail, which are computed from the time of the delivery of the writ to the clerk of the errors. (p)

When a writ of error is sued out before final judgment, four days are to be reckoned from the period when the taxation of costs is completed, by the insertion of the sum in the judgment; for until the costs are taxed, the amount of the penalty of the recognizance of bail in error cannot be fixed; (q) and in ejectment if the lessor of the plaintiff elect to waive his taxation of costs, and proceed for the recovery of possession only, the court will not interfere to prevent him, notwithstanding the allowance of the writ of error. (r)

The consequence of not putting in bail when re-

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(o) *Hunter v. Sampson*, 2 Stra. 781. *Jaques v. Nixon*, 1 T. R. 279. *Clay v. Bracebridge*, id. 280. *Bennet v. Nichols*, 4 id. 121. *Gravall v. Stimpson*, 1 B. & P. 478. See *Somerville v. White*, 5 East, 145. *Hill v. Tebb*, 1 N. R. 298. *Emanuel v. Martin*, 2 M. & S. 334. and note(o).

(p) R. E. 36 Car. 2. K. B. R. T. & M. 28 Car. 2. C. P. *Blackburn v. Kymer*, 5 Taunt. 673. 1 Marsh, 1 278. s. c.

(q) *Blackburn v. Kymer*, 5 Taunt. 672. 1 Marsh, 278. s. c.

(r) *Doe dem. Messiter v. Dyneley*, 4 Taunt. 289.

quired, within the time prescribed for that purpose, is not, it would appear, to render the writ of error an absolute nullity, but to destroy its effect as a *superseas* of execution; and the party succeeding in the original action would be entitled to sue out immediate execution; (s) and this proceeding may be taken without previously obtaining a certificate from the clerk of the errors that no bail had been given. (t)

Of putting in and justifying bail in error.

Within what time.

On putting in bail, a memorandum entitled in the original cause, containing their names and additions, should be prepared and delivered to the clerk of the errors, who attends to take the acknowledgment of the bail in the court wherever the judgment was given, or at the chambers of a judge of that court. And when a judgment is affirmed, and another writ of error is brought upon the judgment of affirmance, the bail, upon the new writ, must be put in, in the court where the record is supposed to remain; but upon an amended writ, it is put in in the court in which the writ of error has been allowed. (u)

How and when put in.

Bail in error cannot be put in before a commissioner in the country; (x) as the stat. 4 W. & M. c. 4. s. 1., which authorizes the appointment, and regulates the duties of commissioners, relates only to bail in actions depending in the court in which the acknowledgment of the bail is taken.

After bail has been put in, notice thereof should be given without delay to the defendant in error or his attorney, (y) and should be served in the same manner, and comprise the same requisites as in ordinary cases. (z)

Notice of bail.

(s) *Lane v. Bacchus*, 9 T. R. 44. ——— *v. Nicholls*, Gent. 2 Chit. Rep. 106. *Smith v. Howard*, 2 D. & R. 85. *Mee v. Hopkins*, id. 208. See *Willes*, 275. 1 B. & P. 478. 2 id. 370. 2 East, 439. *Barnes*, 202.

(t) *Inclendon v. Clarke*, *Barnes*, 212.

(u) *Rafael v. Verelst*, 2 Bl. Rep. 1067.

(x) *Lushington v. Exe dem. Godfrey*, *Barnes*, 78. Ca. Pr. C. P. 152. Pr. Reg. 180. s. 6.

(y) R. M. 5 W. & M. K. B.

(z) Ante, p. 291.

Of putting  
in and jus-  
tifying bail  
in error.

In this and the subsequent necessary notices, the names of the plaintiff and defendant in the original action are continued, and not reversed until the transcript of the record is carried in and filed.

Within  
what time  
to except,  
and notice  
thereof.

Notice of bail being given, the defendant in error has twenty days allowed him after such notice, to accept of, or except to them; (a) and if he does not except to them within that period, he cannot afterwards object to their sufficiency.

The defendant in error, if he is dissatisfied with the bail put in, and intends to object to their competency, may at any time within the twenty days, obtain a rule from the clerk of the errors for better bail, which is the same in effect as entering an exception against bail in an original action.

A copy of this rule should be served on the attorney for the plaintiff in error.

Within  
what time  
bail should  
justify.

In all the courts, if the bail do not justify, or other bail be not put in and perfected within four days after notice of the rule, in term time, they are considered as a nullity; (b) but where the rule for better bail is served in vacation, there appears to be some diversity in the practice of the different courts. Thus, in the King's Bench, the bail, under such circumstances, are not compellable to justify until the next term; but the plaintiff in error must either give notice of justifying the same bail, or put in such other bail as he will abide by, within the four days allowed by the rule, it having been determined that he cannot give notice of fresh bail after the four days, un-

(a) R. M. 5 W. & M. K. B., R. M. 6 Geo. 3. Reg, 6 C. P. R. T. 24 & 27 Geo. 2. 1 Salk. 97., and *Gibbons v. Dove*, id. 3 id. 56. Man. Ex. Prac. App. 210.

(b) *Gould v. Holmstrom*, 7 East, 580. *Lunn v. Leonard*, 1 M. & S. 368., and note id. *Smith v. Carruthers*, 4 Price, 289.

less indeed the bail already put in are prevented from justifying by special circumstances, which must be disclosed to the court by affidavit, at the time appointed for justification. (c) In the Common Pleas, when the rule is served in vacation, the plaintiff in error has not time, of course, to perfect his bail until the next term, but ought to justify before a judge; and if the defendant in error be not satisfied with that, then the plaintiff in error having done every thing in his power, is entitled to time for justifying until the next term, but not otherwise. (d) In the Exchequer or Pleas, it is a rule, (e) that "if bail in error shall be excepted to, and notice of exception given in writing to the attorney or clerk in court for the plaintiff in error in term time, such bail shall be perfected and justified within four days after notice so given, or the defendant in error may in default thereof, proceed to execution, notwithstanding such writ of error; but where notice of exception shall be given in vacation time, then such bail shall be perfected and justified upon the first day of the subsequent term, unless the defendant in error, his attorney or clerk in court shall consent to a justification before one of the barons, in which case such bail shall justify themselves before a baron, within four days after notice of such exception given in writing to the plaintiff in error, his attorney or clerk in court; and in default of such justification, the defendant in error may proceed to execution, notwithstanding such writ of error."

Of putting in and justifying bail in error.

Within what time bail should justify.

The mode of giving notice of justification, and making an affidavit of the service and justifying bail in error, is the same as in the original action; but in the

In what manner to justify.

(c) *Lunn v. Leonard*, 1 M. & S. 866. id. 367. s. c.

(d) *De Revoſé v. Hayman*, Barnes, 241. 2 Blac. Rep. 1064.

(e) R. T. 26 & 27 Geo. 2.

Of putting  
in and jus-  
tifying bail  
in error.

In what  
manner to  
justify.

King's Bench an extension of time is never granted to enable bail in error to justify, (f) unless it can be satisfactorily shewn that they were prevented from attending the court, by improper conduct on the part of the defendant in error or his attorney. (g) And in the Common Pleas, time will not be allowed, unless some real and substantial error in the record can be suggested. (h)

In ejectment, although the bail may be interrogated as to their sufficiency, the plaintiff in error, if he be a party to the recognizance, cannot be examined; and therefore, where the lessor of the plaintiff swore that the defendant was insolvent, and also, that he (the lessor) had a mortgage upon the land for more than it was worth, the court, nevertheless, determined, that the defendant's recognizance was sufficient to entitle him to his writ of error. (i)

Rule for  
allowance.

The rule for the allowance of the bail in error is drawn up, and a copy served on the defendant's attorney, as in other cases.

### CHAPTER III.

#### OF THE LIABILITY AND DISCHARGE OF BAIL IN ERROR.

How far  
liable.

THE condition of the recognizance in the Common Pleas, on a writ of error returnable in the Court of King's Bench, is framed in accordance with the provision of the

(f) 1 Chit. Rep. 76. n.

(g) Dyott v. Dunn, 1 D. & R. 9.

(h) Handasyde v. Morgan, 2 Wils. 144.

(i) Thomas v. Goodtitle, 4 Burr. 2501. Keene d. Lord Byron v. Deardon, 8 East, 298.



statute 3 Jac. 1. that the plaintiff shall prosecute his writ of error with effect; and if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs and damages as shall be awarded by reason of the delay of execution, or else, that they (the bail) shall do it for him. How far liable.

A recognizance on a writ of error *coram nobis*, is nearly similar to the preceding.

But on a writ of error returnable in the Exchequer chamber, the language of the condition of the recognizance is in some respects different, the bail engaging to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money, as shall be awarded for delay of execution. (a)

As bail in error stipulate by the express term of the recognizance, that the plaintiff in error shall prosecute his writ with effect, if the judgment be therefore affirmed, or the writ of error discontinued, or the plaintiff *non prossed*, although the record may not have been transcribed, (b) the recognizance is forfeited, (c) and the bail immediately become liable.

The responsibility of bail in error will not be extended by construction beyond the express terms of their engagement, and consequently, the words in the recognizance, "costs and damages to be awarded by reason of the delay of execution," have been interpreted to mean only such damages and costs as are given by the court of error, and that they are not liable to pay interest accruing between the time of the original judgment and ap-

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(a) See 2 T. R. 59. n. (a)

(b) *Roe v. Whitehead*, Barnes, 499.

(c) 1 Rol. Rep. 329.

How far  
liable.



pearance, though they are liable for the interest, subsequent to the day of affirming the judgment. (d)

In ejectment, bail in error are not chargeable with the mesne profits under the statute 16 and 17 Car. 2. c. 1. s. 4. unless their amount has been first ascertained by a writ of inquiry, pursuant to the provision therein contained. (e)

How discharged.

The recognizance of bail in error being absolute and unconditional, and not in the alternative, it is an established rule, that they cannot divest themselves of their responsibility by surrendering their principal to the plaintiff in error; (f) and upon this ground it has also been determined, that the bail are not entitled to relief, on the principal becoming bankrupt pending the appeal. (g)

When the bail themselves become bankrupt before the judgment is affirmed, they are not discharged from their recognizance; for prior to affirmance, the debt is contingent and not proveable under the commission. (h)

Bail in error are not discharged by their principal being taken in execution under a *ca. sa.* for the debt, damages, and costs in error, and the plaintiff may therefore sue them upon their recognizance, even whilst the principal is in custody. (i) And where the writ of error has had the effect of staying execution, it is not competent to the plaintiff in error to vacate the recognizance by *non-pro-*

(d) *Welford v. Davidson*, 4 Burr. 2128. 2 Doug. 753. n.: *Fritch v. Leroux*, 2 T. R. 57. Anon. 6 Price, 338.

(e) *Doe v. Reynolds*, 1 M. & S. 247. See 1 Geo. 4. c. 87.

(f) *Austen v. Monk*, Cro. Jac. 402. Moor, 853. pl. 1165. s. c. Anon. Loft, 238.

(g) *Southcote v. Braithwaite*, 1 T. R. 624.

(h) *Hockley v. Merry*, 2 Stra. 1043. more fully reported Ca. Temp. Hard, 262. See 1 Doug. 160.

(i) *Perkins v. Pettit*, 2 B. & P. 440.

sing his own writ of error, but a forfeiture of the recognizance will be thereby created. (k)

How discharged.

When bail in error have been excepted to, and do not justify, but omit to have their names struck out of the bail-piece, the court, on application, will relieve them on the ground of inadvertence, (l) though, while their names continue on the bail-piece, they are liable to be proceeded against, and the court will not stay the proceedings except upon the payment of the costs incurred. (m)

## CHAPTER IV.

### OF THE PROCEEDINGS AGAINST BAIL IN ERROR.

On the affirmance of the judgment, or on the writ of error being non-prossed or discontinued, the defendant in error may proceed against the bail on their recognizance, by action of *debt or scire facias*, at his election. The characteristics which distinguish these modes of proceeding from each other, the advantages appropriated to each, and the general manner of conducting them, having been already considered, (a) it will, in this division of the subject, be sufficient merely to state what is peculiar to the proceedings against bail in error.

Election to proceed by action of debt or *sci. fa.*

As a render, we have seen, will not exonerate the bail, it is unnecessary to sue out a *capias ad satisfaciendum* against the principal as a step preliminary to suing the bail.

In an action of debt, the proceedings are precisely

(k) *Dickenson v. Heseltine*, 2 M. & S. 210.

(l) *Tubb v. Tubb*, Sayer's Rep. 58. 1 Wils. 337. s. c.

(m) *Gould v. Holmstrom*, 7 East, 580. *Faulder v. Hicks*, M. T. 1821. C. P. MS. S. P.

(a) Ante, p. 362.

By action  
of debt.

similar to those against bail in original actions. If the principal as well as the bail be a party to the recognizance, the suit must be brought against all the cognizors jointly, if living, or against each separately; but a mistake in this particular can only be pleaded in abatement, and cannot be made the subject of a demurrer. (b) The venue should be laid in Middlesex, except in an action on a recognizance taken at chambers before a judge of the Court of Common Pleas, in which case the venue may be laid either in Middlesex or London. (c)

*Nul tiel record* is a good plea in bar to the action, but the bail cannot plead that the principal has been taken in execution, (d) or has been surrendered, (e) or has become bankrupt. (f)

The mode of entering up judgment and suing out execution is the same as in ordinary cases.

By *sci. fa.*

The *scire facias* against bail is prepared by the clerk of the errors, and on a recognizance taken in the King's Bench, the writ recites not only the recognizance, but the condition of it, and the affirmance of the judgment; but on a recognizance, acknowledged in the Court of Common Pleas, the *scire facias* merely states the recognizance and non-payment of the sum acknowledged to be due; for in that court, the condition of the recognizance in error is not incorporated, so as to constitute a component part of the record, as it is in a recognizance of bail on a *capias ad satisfaciendum*, but is subscribed by way of defeazance, so that the recognizance and condition are two distinct records. (g)

(b) 1 Chit. pl. 31.

(c) For forms of declarations, see Petersdorff's Index to Precedents, tit. "Recognizance."

(d) Perkins v. Pettit, 2 B. & P. 440.

(e) Anon. Lofft, 238., et ante, p. 470.

(f) Southcote v. Braithwaite, 1 T. R. 624.

(g) Malland v. Jenkins, Barnes, 93. Crosse v. Porter, id. 339.

If the plaintiff in error be a party to the recognizance, the *sci. fa.* must be brought either against him and both of the bail collectively, or against each of them separately, for if only two of them be included in the writ, it will be bad on demurrer. (h)

By *sci. fa.*

The *scire facias* must be brought in the court where the recognizance was acknowledged, unless it was taken in the Common Pleas, and then the *sci. fa.* may be brought either in that court or in the King's Bench, to which the record is supposed to be removed. (i) If the writ of error were from the King's Bench to the Exchequer chamber, the *sci. fa.* must be directed to the sheriff of Middlesex, without reference to the fact of whether the recognizance was taken in court or before a judge at chambers; but if the record were removed from the Court of Common Pleas to the King's Bench, and the recognizance acknowledged before a judge at chambers, the writ of *sci. fa.* may be addressed either to the sheriff of Middlesex or London.

The manner of suing out the *sci. fa.* and the ulterior proceedings incident thereto, have been already detailed. (k)

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(h) 2 Saund. 72. c.

(i) *Drew v. Barksdale*, 1 Show, 343. Comb. 199. s. c. See form Lit. Ent. 343.

(k) Ante, p. 368.

2. The first part of the paper is devoted to a study of the properties of the function  $f(x)$  which is defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$

It is shown that the function  $f(x)$  is continuous and differentiable for all values of  $x$  and that its derivative is equal to  $\frac{1}{1+x^2}$ .

It is also shown that the function  $f(x)$  is bounded for all values of  $x$  and that its maximum value is equal to  $\frac{\pi}{2}$ .

The second part of the paper is devoted to a study of the properties of the function  $g(x)$  which is defined by the equation

$$g(x) = \int_0^x \frac{t}{1+t^2} dt$$

It is shown that the function  $g(x)$  is continuous and differentiable for all values of  $x$  and that its derivative is equal to  $\frac{x}{1+x^2}$ .

**PRACTICAL TREATISE**  
**ON**  
**THE LAW OF BAIL.**

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**PART THE THIRD.**

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**BAIL IN CRIMINAL PROCEEDINGS.**

**CHAPTER I,**

**OF THE ORIGIN AND GENERAL NATURE OF THE LAW OF  
BAIL IN CRIMINAL PROCEEDINGS.**

IN the preceding divisions of this work it has been seen, that in civil actions, defendants, when arrested, are in all cases bailable. There is, however a material distinction between admitting a party to bail who has not performed a civil contract, and liberating a prisoner from confinement, who has violated the laws provided for the preservation of the lives and property of individuals, and the security of the state. In the former instance the sureties or persons who become bail, being responsible to the plaintiff in the event of the non-appearance of the defendant, is equivalent to the detention of the principal in custody; but in the latter, the escape of the culprit can never be compensated to the public by the bail being subjected to the payment of a penalty. The right of

parties to be admitted to bail in criminal cases, has been, therefore, at different periods, circumscribed by the legislature, and is now only allowed where manifest injustice would accrue from the privilege being withheld.

In the infancy of our criminal code, both anterior and subsequent to the conquest, all felonies were consideredailable before conviction. Means were even permitted to be adopted to liberate prisoners confined on charges of homicide: 1st. By the writ *de odio et atia*. 2dly, By the demand of the ordinary, in case he was a clerk.

The writ *de odio et atia* was directed to the sheriff, (a) commanding him to make inquisition by the oaths of lawful men, to ascertain whether the party in custody was charged through malice; and if it were determined that he was accused *odio et atia*, and that he was not guilty; or that he could plead a justifiable defence, as that he committed the act *se defendendo*, or *per infortunium*, a writ was then sued out, denominated a *tradas in ballium*, by which the sheriff was enjoined to discharge the party accused, if he could produce twelve good and lawful mainpernors. (b)

If the individual imprisoned, in cases of homicide, were a clerk, the ordinary might demand him, without any preliminary inquisition, and he was then confined in the prison of the bishop, or if the ordinary gave his permission, in that of the king, until he had exculpated himself from the charge, or submitted to the punishment prescribed by the ecclesiastical law.

The privilege of obtaining the writ *de odio et atia* was

(a) If the bailiff of a liberty would not admit a person to bail according to the sheriff's direction, there issued a writ to the sheriff commanding him, *non obstante libertate*, to enter and make deliverance himself. Bract. 122. b. 123. a. b.

(b) The writ or inquisition, *de odio et atia*, had a clause in it, "*nisi indicatus vel appellatus fuerit coram justitiariis ultimo itinerantibus*;" so that the inquisition was not in such case to be taken. Ibid.



in the time of Bracton unrestricted, and in all other instances an uncontrolled discretionary power was vested in the sheriffs, of liberating persons charged with crimes of the utmost enormity. He alone was to determine, from the nature of the accusation, the circumstances and character of the person charged, and other concomitant facts, whether he would commit the offender to prison, or admit him to bail. But this unlimited authority was soon found so productive of inconvenience, and afforded such facilities for oppression, that in the reign of Edward I. a statute (c) was passed to restrain the too frequent use of this writ; and it was abolished by the statute 28 Ed. 3. c. 9. though it would seem to be revived by the act of 42 Ed. 3. c. 1. which repeals any statute made inconsistent with the provision of *magna charta*, and *charta de foresta*. (d)

Before the introduction of the statute of Westminster, (e) the offences which were or were not replevisable, had not been distinctly defined. As soon, however, as the commons of the kingdom obtained a share in the representation of the people, the formidable abuses, arising from this imperfect and unsettled state of the law, were corrected. It was accordingly provided, that prisoners outlawed, abjurors of the realm, provers, those taken with the manour, breakers of the king's prison, thieves openly defamed, those appealed by provors (so long as the provors are living), those taken for house-burning, for false money, or for counterfeiting the king's seal, persons excommunicate taken at the request of the bishop; (f) or for offences

(c) 6 Edw. 1. c. 9.

(e) 3 Edw. 1. c. 15.

(d) See 2 Inst. 55. 43. 315.

(f) Sed vide stat. 53 Geo. 3. c. 127. s. 2 & 3., which enacts, that no sentence of excommunication shall be pronounced by ecclesiastical courts, in cases of contempt or disobedience to their order; and that persons excommunicated shall in no case incur any civil penalty or disability.

manifest, or traitors to the king, shall not be bailable: but such as be indicted of larceny by inquests before sheriffs or bailiffs, or of light suspicion, or for petty larceny under twelve pence (if not guilty of larceny aforetime), or guilty of receipt of felons, or of commandment or force, or of aid of felony done; or guilty of any other trespass, for which one ought not to lose life or member; and persons appealed by provor, after the death of the provor, shall be bailable by sufficient surety, whereof the sheriff shall be answerable: and if the sheriff, or any other, let persons not bailable go by surety, and be thereof attainted, he shall lose his fee and office for ever; and if any undersheriff, constable, or any other bailiff of fee, do so contrary to the will of his lord, they shall be imprisoned three years and make fine at the king's pleasure; and if any withhold prisoners bailable, after they have offered sufficient surety, he shall pay grievous amercement to the king; and if he take reward for it, he shall pay the prisoner double, and make fine to the king."

But these enactments of the legislature having been frequently evaded by secret artifices, not contemplated by the framers of the act, induced the parliament in the reign of Richard the Second to pass a statute, (g) which, after reciting, that "forasmuch as thieves notoriously defamed, and others taken with the manour by their long abiding in prison after that they be arrested, be delivered by charters and favourable inquests, procured to the great hindrance of the people: declared, that in every commission of the peace through the realm, where need shall be, two men of the law of the same county where such commission shall be made, shall be assigned to go and proceed to the deliverance of such thieves and felons as often as they shall think it expedient."

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(g) 17 Ric. 2. c. 10.

In the reign of Richard the Third, (h) to obviate the evils attendant upon the writ *de odio et atia* on the one hand, and the arbitrary discretion of the sheriff on the other; it was expressly provided, that every justice of the peace should have a discretionary power to let such persons to bail or mainprize, as if they had been indicted before the justices at the sessions. But their power was expressly confined to persons arrested on slight suspicions.

This statute, although in some respects beneficial, contributed in general to obstruct the due administration of the law, as every justice of the peace, being individually authorized to take bail, criminals not legally mainprizable, were permitted to re-obtain their liberty.

To remove these inconveniences the stat. 1 Ric. 3. was repealed; and in the reign of Henry the Seventh (i) it was ordained generally, "That the justices of the peace in every shire, city, or town, or two of them at the least, whereof one to be of the quorum, have authority and power to let any such prisoners or persons mainpernable by the law, that have been imprisoned within their several counties, city, or town, to bail or mainprize unto their next general sessions, or unto the next gaol delivery of the same gaols in every shire, city, or town, as well within franchises as without, where any gaols have been or hereafter shall be; and that the said justices of the peace, or one of them, so taking any such bail or mainprize, do certify the same at the next general sessions of the peace, or the next general gaol-delivery of any such gaol, within every such county, city, or town, next following after any such bail or mainprize so taken, upon

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(h) 1 Ric. 3. c. 3.

(i) 3 Hen. 7. c. 3. s. 3. 19 Hen. 7. c. 10.

pain to forfeit unto the king for every default thereupon recorded." And, it was further enacted by the same statute, "That every sheriff, bailiff of franchise, and every other person having authority or power of keeping of gaol, or of prisoners for felony, in like manner and form do certify the names of every such prisoner in their keeping, and of every prisoner to them committed for any such cause, at the next general gaol-delivery in every county or franchise where any such gaol or gaols have been or hereafter shall be, there to be kalendered before the justices of the deliverance of the same gaol, whereby they may, as well for the king as for the party, proceed to make deliverance of such prisoner according to the law, upon pain to forfeit unto the king for every default thereof recorded; and that the foresaid act, (k) giving authority and power in the franchises to any justice of the peace by himself, be in that behalf utterly void and of none effect." (l)

Still, however, the security afforded to the subject against malicious imprisonment was inadequate: the act was evaded; and the legislature once more obliged to interpose. For although the statute of Henry the Seventh required two justices, at least, to authorize the discharge of a party from custody, it gradually became the practice for one to take the bail and insert the name of another justice of the peace, who was seldom present. By this system prisoners were admitted to bail, neither with the solemnity nor caution which was required by the legislature.

To remove these impediments to justice, several salutary provisions were made by the statute 1 & 2 Ph. & M.

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(k) 1 Ric. 3. c. 3.

(l) See Parliamentary History, II. 419.

c. 13. (m) which enacts, “ That no justice or justices of the peace shall let to bail or mainprize any such person or persons, which for any offence or offences by them or any of them committed, are declared not to be replevied or bailed, or be forbidden to be replevied or bailed by the statute of Westminster.” (n) And it also provides, “ That any person or persons arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by law, shall not after the day therein mentioned, be let to bail or mainprize by any justices of the peace, if it be not in open sessions ; except it be by two justices of peace at the least, whereof one to be of the *quorum*, and the same justices to be present together, at the time of the said bailment or mainprize, which bailment or mainprize they shall certify in writing, subscribed or signed with their own hands at the next general gaol delivery, to be holden within the county where the said person or persons shall be arrested or suspected.” (o)

There is, however, a provision in this act as to bail taken in London or Middlesex, and other cities, boroughs, and towns corporate. “ That justices of peace and coroners within the city of London and county of Middlesex, and in other cities, boroughs, and towns corporate, within this realm and Wales, shall within their several

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(m) See 2 & 3 Ph. & M. c. 10.

(n) Sect. 2.

(o) Section 3. See 3 Bulst. 113., and the 4th section of the same statute enacts, “ That the said justices, or one of them, being of the *quorum*, when any such prisoner is brought before them for any manslaughter, or felony, before any bailment or mainprize, shall take the examination of the said prisoner, and information of them that bring him of the fact and circumstances thereof, and the same or as much thereof as shall be material to prove the felony shall be put in writing before they make the same bailment ; which said examination, together with the said bailment, the said justices shall certify at the next general gaol delivery, to be holden within the limits of their commission.”

jurisdictions have authority to let to bail felons and prisoners, in such manner and form as they have been heretofore accustomed." (p)

In this act, it will be observed, that the provisions of the statute of Westminster were again expressly recognized; regulations which the legislature had uniformly indicated an anxiety to preserve and enforce. The remedies which had been attempted to be afforded, by the enactments in the reign of Richard the Third, (q) were put on a more stable and permanent basis, not only by requiring that the bail must be taken by two justices at least, unless it was accepted in open sessions when partiality could not be exercised, or justice made subservient to private interest, but by directing that both the justices must be present at the time of admitting the accused to bail. All the evasions and subterfuges which had been previously resorted to, were thus finally prevented, and the present system of bailing criminals established.

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## CHAPTER II.

BY WHOM BAIL MAY BE TAKEN, AND IN WHAT INSTANCES  
IT SHOULD OR SHOULD NOT BE ACCEPTED.

### SECTION I.

BY THE HOUSES OF PARLIAMENT.

THE House of Peers, or House of Commons, during their sessions, may bail a person committed for a contempt. (a)

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(p) Sec. 6.

(q) Vide ante.

(a) See Skin. 683, 4.

## SECTION H.

BY THE COURT OF KING'S BENCH.

**THE** Court of King's Bench, being the supreme criminal tribunal in the kingdom, and its authority not being affected by the statute of Westminster, 3 Edw. 1. c. 15. has an absolute and unlimited power in bailing offenders:

General  
authority.

That court in term, or any of its judges in vacation, may in their discretion accept bail on charges even of high treason, murder, or any other species of felony: (b) But although invested with this authority, they invariably act in conformity with the acknowledged rules adopted by other criminal jurisdictions, and never admit to bail those who are incapable of being released from prison by an inferior tribunal, without some particular circumstances in their favour, or cogent reason to induce the court to grant the indulgence (c)

A defect in the warrant of commitment, will not afford any additional ground to influence the court to discharge the party out of custody, when it can be clearly collected from the examinations and depositions returned, that there is any substantial cause for the prisoner being remanded. (d) This rule applies both with respect to the

(b) Com. Dig. Bail, F. 4. Bac. Ab. Bail, D. See *Witham v. Dutton*, Comb. 111. *Platt's case*, 1 Leach, 168. *Rex v. Remnant*, 5 T. R. Rep. 169. s. c. 1 East, P. C. 420. s. c. Nol. Rep. 205. *Rex v. Marks*, 3 East, 157. *Elderton's case*, 2 Ld. Raym. 978. Holt, 500. Skin. 688. Cowp. 333. 1 Wils. 29. *Rex v. Baltimore*, 1 Bl. Rep. 648. *Rex v. Grieffenburgh*, 4 Burr. 2179.

(c) 2 Hawk. P. C. 114. Bulst. 87.

(d) *Rex v. Marks*, 3 East, 157. *Rex v. Wyer*, 2 T. R. 77. Vide 2 East, P. C. 255. *Platt's case*, Leach, Cr. Law, 163. *Rex v. Tudd*, ibid. 485. 5 T. R. 169. 2 Hawk. P. C. 114. *Crompt. Jus.* 154. *Rex v. Remnant*, 5 T. R. 169. s. c. Nol. Rep. 205. s. c. 1 East, P. C. 420. 2 Leach, Cr. Law, 583. "In cases of defective commitments, the practice used formerly to be to draw up a rule, remanding the prisoners in general terms to the same custody as before; but it occurred to the officers of the crown office to suggest an alteration of the practice in

By the  
Court of  
King's  
Bench.

General  
authority.

law and the fact. Unless there is a reasonable doubt as to the truth of the accusation, the prisoner must be re-committed; and the same consequence follows, unless there is a reasonable doubt whether the fact charged legally constitutes any offence within the cognizance of the criminal law.

This discretionary power of accepting bail may be exercised, whether the indictment was originally preferred in the Court of King's Bench, or removed from an inferior jurisdiction; (e) and the court will grant or refuse their aid according to the length of the imprisonment, (f) the nature and tendency of the crime, (g) the dignity of the court, or authority of the party by whom the prisoner was committed. (h) But they will seldom exercise this superintending jurisdiction, unless there appear particular circumstances of ignorance, mistake, corruption, or irregularity, in the commitment. (i)

Where a party has been confined in prison for a length of time, so as to endanger his life, he may be bailed. (k) But to induce the court to accept bail on account of sickness, it must be a present indisposition arising out of the confinement. (l) Hence they will not admit to bail where it is a constitutional complaint, (m) nor where

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this respect, founded upon the consideration that prisoners thus remanded might renew the same application to another court, or a judge; and the rule is now drawn up, ordering the prisoner to be discharged from his imprisonment, by virtue of the warrant mentioned in the return, and to be recommitted for the offence. 3 East, Rep. 166.

(e) Hale, P. C. 104. 1 Bulst. 85. 2 Hawk. P. C. 102. Elderton's case, Holt, 590. 2 Ld. Raym. 978. s. c. 6 Mod. 73. s. c. Armstrong v. Lisle, 1 Salk. 60.

(f) Latch, 12. 2 Bulst. 140. Rol. Rep. 218. 337.

(g) Bulst. 48. to 54.

(h) 2 Bulst. 139. Addis' case, Cro. Jac. 219. Freeman's case, Cro. Car. 579. Vaugh. 139. 2 Hawk. P. C. 112. Rex v. Mayo, Sid. 144. Rex v. Whitmore, ibid. 286. Rex v. Bethel, 5 Mod. 19.

(i) 2 Leach, Cr. Law, 583, 4.

(k) Lord Aylesbury's case, 1 Salk. 103, 4.

(l) Rex v. Wyndham, 1 Str. 4. (m) Ibid.



the illness arises from the act of the prisoner. (*mm*) And they refused to accede to an application for the discharge of a party, on the plea of illness, who had been committed for *repeated* acts of forgeries; (*n*) but, under similar circumstances, granted it to one convicted of a seditious libel before judgment. (*o*) In the latter case the court said:—  
 “The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore, bail him for the present, and we will give judgment when he is better.”

By the  
Court of  
King's  
Bench.

General  
authority.

In all cases, where it appears that a prisoner ought to be bailed, if he be unable to defray the expenses of being brought to Westminster for that purpose; a rule to shew cause will be granted, why he should not be bailed by a magistrate in the country, with a certiorari to return the depositions before them. (*p*)

The Court of King's Bench have uniformly admitted persons to bail, imprisoned by the King's special command, or by order of the Privy Council, when the commitment has described the offence or cause for which the party had been imprisoned, subject to the same rules which direct its discretionary power in granting bail in other cases; (*q*) but a person, illegally committed by the command of the King, cannot be bailed by any other jurisdiction. (*r*)

Committal  
by the  
King and  
Privy Coun-  
cil.

A party, confined under a Parliamentary commitment

(*mm*) *Rex v. Wyndham*, 1 Str. 4.

(*n*) *Rudd's case*, 1 Leach, Cr. L. 117. See Cowp. 333.

(*o*) *Rex v. Bishop*, 1 Str. 9.

(*p*) *Rex v. Jones*, 1 B. & A. 209.

(*q*) *Barkham's case*, Cro. Car. 507. *Freeman's case*, id. 579. *Kendal's case*, 5 Mod. 78. 1 Salk. 347. s. c. Comb, 343. s. c. Holt, 144. s. c. 12 Mod. 82. s. c. 1 Ld. Raym. 65. s. c. 2 Leon, 175. 2 Wils. 205. 244. Palm. 559. As to general warrants, see *Entick v. Carrington*, 2 Wils. 275. *Wilkes v. Wood*, Lofft, 1. As to the power of a Secretary of State arresting for high treason, see *Rex v. Despard*, 7 T. R. 736. (*r*) 2 Inst. 189.

By the  
Court of  
King's  
Bench.

After  
committal  
for con-  
tempt by  
House of  
Peers and  
Commons.

After  
committal  
for con-  
tempt by  
other  
courts.

After  
committal  
in execu-  
tion.

for a breach of privilege, cannot be admitted to bail. (s)  
When either the House of Peers or Commons have re-  
solved that a contempt has been incurred by an infringe-  
ment of their rights and immunities, their adjudication  
is equivalent to a conviction, and their commitment in  
consequence is in execution; and no jurisdiction can dis-  
charge or bail a person that is in execution by the judg-  
ment of any other court.

The same deference, which is paid to the authority of  
the House of Lords or Commons, is extended to com-  
mitments for contempts by all the superior courts of law  
and equity. Although the cause of contempt be not defi-  
nitely and explicitly described in the warrant, the higher  
tribunals will favourably construe the proceedings of an  
inferior jurisdiction, and not inferentially intend that  
they acted beyond the scope of their authority. (t)

A further exception to the general rule, that an un-  
limited power of granting or refusing bail is vested in the  
Court of King's Bench, occurs where the commitment is

(s) 2 Hawk. P. C. 110. 2 Hale, P. C. 129. Earl of Shaftesbury's case, 3 Keb. 792. 1 Mod. 144. s. c. Prichard's case, Sid. 245. 1 Lev. 165. s. c. Lord Stafford's case, Raym. 181. Rex v. Earl of Salisbury, 1 Show, 100. Carth. 181. s. c. Regina v. Paty, 2 Salk. 503. 2 Ld. Raym. 1105. s. c. Murray's case, 1 Wils. 299. Crosby's case, 3 Wils. 188. 2 Bl. 754. Rex v. Flower, 8 T. R. 314. *Burdett v. Abbott*, 14 East, 1. 4 Taunt. 401. s. c. *Hobhouse's case*, 3 B. & A. 420. 2 Chit. Rep. 207. s. c. In the Earl of Shaftesbury's case, it was holden, that this rule obtains, although the writ does not express the nature of the contempt, nor the place where it was committed, nor the time when it was committed, nor whether it was on a conviction or accusation only. But, in the case of Rex v. the Earl of Derby, 1 Show, 102. 2 St. Tr. 742. s. c., it was determined that a peer, on an impeachment by the House of Commons, may be bailed by the Court of King's Bench, after a dissolution or prorogation of parliament.

(t) 12 Rep. 83. Vaugh. 135. Moor, 839. 1 Leon, 702. 3 Id. 18. 1 Bulst. 259. 3 id. 115. *Barkham's case*, Cro. Car. 507. *Anon.* id. 579. 1 Rol. Rep. 192. 218. 245. *Bethell's case*, 1 Salk. 348. same case differently reported, 1 Ld. Raym. 47. Holt, 145. s. c. *Murray's case*, 1 Wils. 299. Lord Shaftesbury's case, 1 Mod. 155. See 14 Inst. 15. 17. 1 St. Tr. 89. 2 id. 617. 620. 3 id. 208. 7 id. 437. 11 id. 317. 2 Hawk. P. C. c. 15. sec. 72, 73, 74.

in execution ; as, were the power in such instances to be exercised, it would be perverting that discretionary authority, which was only designed to release the accused whilst his culpability was uncertain, and his consequent punishment undecided. (u)

By the  
Court of  
King's  
Bench.

After  
committal  
in execu-  
tion.

Although the party may have a right of appeal, he cannot be bailed during the pendency of such appeal, as an appeal does not suspend the execution of a judgment which it is brought to reverse. (x)

### SECTION III.

#### BY THE OTHER COURTS OF WESTMINSTER.

THE Courts of Common Pleas and Exchequer, at any time during the term, or any judge or baron in vacation, and the Chancery, either in term or vacation, may, by the common law, award a *habeas corpus* for any person committed for a crime under the degree of treason or felony ; and thereupon discharge him, if it shall plainly appear by the return that the commitment was illegal ; or bail him, if it was doubtful.

(u) See 2 Inst. 187. 4 id. 178. Hale, P. C. 101. Anon. Cro. Car. 579. Skin. 683. Rex v. Keat, 5 Mod. 288. 1 Salk. 103. s. c. Rex v. Wilkes, 4 Burr. 2539. Rex v. Waddington, 1 East, 159. Regina v. Layton, 1 Salk. 105. Rex v. Brooke, 2 T. R. 190. See Rex v. Rhodes, 4 T. R. 220. So if the *mittimus* states that the felony was confessed upon examination, the party will not be bailed, 4 Inst. 178. 3 Bulst. 114. Though upon the verdict of *curia advisare vult*, whether the party shall have clergy or not, he may be bailed. 1 Bulst. 188.

(x) As where the party was committed under the vagrant act, though an appeal is given to the Quarter Sessions, Rex v. Brooke, 2 T. R. 190. But where a defendant was convicted for keeping an alehouse without a licence, and thereupon committed for a month, according to the act ; after lying in prison a fortnight, a *certiorari* was brought, and upon its return, the party was admitted to bail ; the court considering, that if the conviction was confirmed, they could commit him in execution for the remainder of the time. Rex v. Reader, 1 Stra. 531.

By the  
other courts  
of West-  
minster.

It is said, in some cases, that the Lord Chancellor may bail for felony. (y)

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## SECTION IV.

### BY THE SERJEANT OF THE HOUSE OF COMMONS.

WHEN the Serjeant of the House of Commons has taken into his custody persons committed by order of the House, he cannot, upon their tendering bail, release them from confinement. (z)

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## SECTION V.

### BY JUSTICES OF THE PEACE.

It has been already observed in a former part of this treatise, that the power and authority of justices to admit to bail, was materially abridged by the provisions of the different statutes. (a) The legislature, by these enactments, intended to abolish, in the most absolute and unqualified manner, the right assumed by individual justices of the peace of bailing felonies, or persons suspected of felony; but, under similar circumstances, left the authority of *two* justices, and justices at session, the same as prior to the statute being passed; and also the power of single justices with respect to misdemeanors. And it will be remembered that, it is provided by the statute

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(y) 2 Inst. 53. 55. 615. 4 Inst. 290. 1 Bac. Abr. 226. Dalison, 81. 2 Hawk. P. C. 115. 2 And. 297. Vaugh. 154. 3 Leon. 18. See Hab. Corp. Act, 31 Car. 2. c. 2.

(z) 1 Lev. 209. Hard. 464.

(a) 1 Ric. 3. c. 3. 3 Hen. 7. c. 3. 1 & 2 Ph. & M. c. 13.

of Philip and Mary, that bail may be accepted in London or Middlesex, and other cities and towns corporate, by an individual justice of the peace, in the same manner as before the enactments of that statute. (c)

By justices  
of the peace.

The various instances, in respect of which justices may or may not accept bail, may be simply arranged under the following analysis: 1st, Instances in which justices cannot bail. 2dly, Instances in which justices may bail in their discretion. 3dly, Instances in which justices ought to bail, premising as a general rule, that the right of the accused to be admitted to bail, principally depends upon the fact, of whether the offence amounts to a felony or misdemeanor.

*1st, Instances in which justices cannot bail:—*

Abduction. (d)

Abjurors of the realm. (e)

Abortion, procuring of. (f)

Approvers. (g)

Arson. (h)

Bail, personating of, in courts of justice, &c. (i)

(c) Vide 1 & 2 Ph. & M. c. 13., et ante, p. 481.

(d) This offence is made felony, by 3 Hen. 7. c. 2., and 39 Eliz. c. 19.

(e) 4 Bl. Com. 298. 2 Hale, 101. 133. Burn J. Bail, iv. See 2 Inst. 187.

(f) 43 Geo. 3. c. 58. s. 1 & 2. See 3 Campb. 73. 76.

(g) 4 Bl. Com. 298. 2 Hale, P. C. 133.

(h) See Hale, P. C. 98. 2 Inst. 188. Hawk. P. C. b. 2. c. 15. s. 45. 23 Hen. 8. c. 1. s. 3. 37 H. 8. c. 6. 4 & 5 P. & M. c. 4. 43 Eliz. c. 13. s. 2. 22 & 23 Car. 2. c. 7. s. 2. 1 G. 1. st. 2. c. 48. s. 4. 9 G. 1. c. 22. s. 1. 1 G. 2. c. 32. s. 6. 9 G. 3. c. 29. s. 2, 3. 12 G. 3. c. 24. s. 1. 33 G. 3. c. 67. s. 5. 39 G. 3. c. 69. 43 G. 3. c. 58. s. 1. 52 G. 3. c. 130. s. 1.

(i) As personating bail in courts of justice is made felony without clergy, by 21 Jac. 1. c. 26.; and before judges on their circuits, and commissioners in the country, is by 4 & 5 W. & M. c. 4. created a single felony, persons charged with either of these offences cannot be bailed, but where the party is imprisoned upon an accusation of having committed such an offence before a judge at chambers, he may be admitted to bail, as such an offence is only a misdemeanor. See ante, p. 322.

By justices  
of the peace.

When they  
cannot bail.

Burglary. (*k*)

Cattle, stealing of. (*l*)

Child stealing. (*m*)

Coin. (*n*)

Confession of crime. (*o*)

(*k*) 1 Hale, P. C. 100. Comb. 106.

(*l*) By the stat. 14 Geo. 2. c. 6. stealing sheep and other cattle was declared to be felony without benefit of clergy; but the words "other cattle" being of too uncertain a signification, were by the 15 Geo. 2. c. 34. restrained to a bull, cow, ox, steer, bullock, heifer, calf, and lamb; hence parties committing these offences cannot be admitted to bail.

(*m*) 54 Geo. 3. c. 101.

(*n*) Counterfeiting the King's money (25 Edw. 3. c. 5. s. 2. 1 Hale, P. C. 188. 1 East, P. C. 148. 157.); marking the edges of coin (25 Edw. 3. c. 5. s. 2. 8 & 9 W. 3. c. 26. s. 3., made perpetual by 7 Anne, c. 25. see 1 East, P. C. 166, 167.); making the silver coin to resemble gold coin, or making the copper coin to resemble silver (15 Geo. 2. c. 28. s. 1. s. 4. s. 5. s. 8.); colouring, gilding, or casing over with gold or silver, or with any other materials, any coin resembling the current coin of this kingdom; or gilding silver blanks (8 & 9 W. 3. c. 26. 56 G. 3. c. 68. s. 17.); counterfeiting foreign gold or silver coin (4 Hen. 7. c. 18. 1 M. c. 1. 1 M. stat. 2. c. 6. 14 Eliz. c. 3. 17 Ric. 2. c. 1. 1 Hale, P. C. 376. 210. 311. 328. 1 East, P. C. c. 4. s. 10.), or copper money (15 Geo. 2. c. 28. s. 6. 11 Geo. 3. c. 40. s. 1. 7 Geo. 3. c. 126. *Rex v. West*, 1 East, P. C. c. 4. s. 11.); clipping, washing, rounding, or filing coin (5 Eliz. c. 11. s. 2. See 1 Hale, P. C. 216. 220. 267. 310.); impairing, diminishing falsifying, sealing, or lightening (18 Eliz. c. 1. See 1 East, P. C. c. 4. s. 20. 1 Hale, P. C. 220. 228. 56 Geo. 3. c. 68. s. 29.); importing counterfeit money of England (25 Ed. 3. stat. 5. c. 2. 1 P. & M. c. 11. 37 Geo. 3. c. 126.); making, mending, or having in possession coining instruments (8 & 9 W. 3. c. 26.); conveying from the mint instruments used in coining, and concealing the same (8 & 9 W. 3. c. 26. s. 1., made perpetual by 7 Anne, c. 25. s. 1.); receiving, paying, putting off a counterfeit coin (8 & 9 W. 3. c. 26. s. 6., made perpetual by 7 Anne, c. 25. s. 3.); uttering, or tendering in payment, counterfeit money to this realm (15 Geo. 2. c. 28. s. 2.), or of a foreign state (57 Geo. 3. c. 126.); are all declared felonies by the above different legislative enactments; and consequently, parties charged with having committed any of these offences cannot be bailed.

But counterfeiting foreign copper coin (43 Geo. 3. c. 139. s. 3.); having clippings or filings of coin in possession, or buying or selling the same (6 & 7 W. 3. c. 17. s. 4.); melting coin; (6 & 7 W. 3. c. 17. s. 8. 17 Edw. 4. c. 1. 13 & 14 Car. 2. c. 31.); sending counterfeit coin, &c. out of the kingdom, for the purpose of its being imported into the British colonies in America, or the West Indies (38 Geo. 3. c. 67. s. 1.); receiving or paying for the current coin any more or less than its lawful value (5 & 6 Edw. 6. c. 19. 51 Geo. 3. c. 127. 52 Geo. 3. c. 50. 53 Geo. 3. c. 5. 54 Geo. 3. c. 52. 56 Geo. 3. c. 68.): are misdemeanors, and therefore bailable.

(*o*) Burn's, Just. Bail, iv. id. tit. Confession, Com. Dig. Bail, 42.

Deer stealing. (*p*)Duelling. (*q*)Embezzling. (*r*)Escapes. (*s*)Fisheries. (*t*)By justices  
of the peace.When they  
cannot bail.

(*p*) By 9 G. 1. c. 22. persons armed and disguised, stealing deer, are declared to be felons.

(*q*) In cases of duels, where death ensues, the important subject of inquiry will be, whether the occasion was altogether sudden, and not the result of preconceived anger or malice. In the latter instance, the killing, though in mutual combat, will admit of no alleviation, and an application to be admitted to bail, must be refused. 1 Hawk. P. C. c. 31. s. 21.

(*r*) Servants, or clerks, receiving any money or other effects on their master's account, and fraudulently embezzling or secreting any part thereof, shall be deemed to have feloniously stolen the same; in which case, if their guilt be manifest, they cannot claim the privilege of being bailed. See 59 G. 3. c. 85. 52 Geo. 3. c. 63., and also 21 Hen. 8. c. 7. A servant embezzling money received from a customer, to whom the master had given it for the purpose of trying the servant's honesty, is within the penalty of these statutes, and of course cannot be bailed. *Rex v. Whittingham*, 2 Leach, C. L. 912. As to offences committed by persons employed in the post-office, see 7 Geo. 3. c. 50. s. 1. re-enacting more largely the provisions of 5 Geo. 3. c. 25. s. 17. 42 Geo. 2. c. 81.; and see 42 Geo. 3. c. 81. s. 1. 48 Geo. 3. c. 116. 52 Geo. 3. c. 143. s. 1.

(*s*) Escapes may be effected by the party himself, or by third persons; in the former case, although the offence might have been originally bailable, he will have forfeited that right, as he could not claim such privilege, after having committed such an additional aggression, as it would create a presumption of his guilt, (2 Inst. 128. 4 Bl. Com. 498.); in the latter instance, where the escape is voluntary, it seems that it would amount to the same species of crime as that for which the principal was in custody; and the question, whether the party aiding the escape is or is not to be bailed, should be regulated by the enormity of the offence committed by the original delinquents. 2 Hawk. P. C. c. 19. s. 22. 1 Hale, P. C. 102. 2 id. 133.

(*t*) By the statute 9 G. 1. c. 22. s. 1. "Stealing any fish out of any river, or pond, by persons armed and disguised, or forcibly rescuing such offenders, or procuring such offence, is made felony without clergy, and, therefore, not bailable." A similar rule prevails as to persons entering any inclosed park, or any garden, and stealing or destroying fish in any river, or other water, or parties charged with aiding therein. 5 Geo. 3. c. 14. s. 1.

Any person maliciously breaking down the head or mound of a fish pond, whereby the fish shall be lost, &c. or forcibly rescuing offenders, or procuring, &c. cannot be bailed, as the statute 9 Geo. 1. c. 22. s. 1. makes it felony without clergy. But it is not an offence within the



By justices  
of the peace.

When they  
cannot bail.

Highway robbery. (*u*)

Forgery. (*x*)

Horse stealing. (*y*)

9 Geo. 1. c. 22. to break down the head or mound of a fish-pond, in order to let the water out, and steal the fish. Ross's case, 2 East, P. C. c. 22. s. 12. p. 1065.

(*u*) The crime of highway robbery is not aailable offence, and the court of King's Bench refused to discharge a prisoner who applied to be bailed, even although eight affidavits of creditable persons, proving an *alibi*, were produced. Rex v. Greenwood, 2 Stra. 1137.

(*x*) The offence of forgery at common law, being only a misdemeanor, wasailable; but the majority of forgeries are now by several acts of the legislature declared to be felony; as forging any record, writ, return, permit, process, or warrant of attorney of the courts of law (8 Hen. 6. c. 12. s. 113.); the name or handwriting of an attesting witness, to any authority to transfer bank stock (37 Geo. 3. c. 112. s. 2.); South Sea stock (*id.*), East India Stock (*id.*), or authority to receive dividends on such stock (*id.*); using any frame for making bank note paper (41 Geo. 3. c. 39. s. 1. 45 Geo. 3. c. 89. s. 3.); causing curved or waving bar-lines to appear visible in the substance of such paper (*id.*); purchasing or receiving forged bank notes (*id.* s. 5 & 6.); having in custody forged bank notes (*id.*); etching and engraving bank notes (*id.* s. 6. & 17.); uttering or publishing forged notes (s. 5. & 6.); forging franks to avoid the postage of letters, (4 Geo. 3. c. 24. s. 8. 42 Geo. 3. c. 63.); the date of such franks (*id.*); the handwriting of the accountant-general (12 Geo. 1. c. 32. s. 9.); the register of the Court of Chancery (*id.*); clerk of the report office (*id.*); cashiers of the Bank of England (*id.*); or any bond under the seal of the East India Company (*id.*); or any endorsement or assignment on such bond (*id.*); with an intent to defraud any person (2 Geo. 2. c. 25. s. 1. 7 Geo. 2. c. 22.), or corporation (31 Geo. 2. c. 22. s. 78. 18 Geo. 3. c. 18.); any deed (2 Geo. 2. c. 25. s. 1. 31 Geo. 2. c. 22. s. 78.), will or testament, (*id.*), bond or obligation (*id.*), bill of exchange or promissory note (*id.*), receipt of money or goods (*id.*), acceptance of any bill of exchange (7 Geo. 2. c. 22. 18 Geo. 3. c. 18.); or any accountable receipt for money (*id.*); order to pay money or deliver goods (*id.*); or forging the seal of the two corporations for marine insurances (6 Geo. 1. c. 18. s. 13.); or any bill, bond, or policy of such corporation (*id.*); or any Bank of England notes, or bills of exchange (45 Geo. 3. c. 89. s. 2.); or bonds under the common seal of the Bank (*id.*); or the hand of a commissioner of the admiralty (1 Geo. 1. st. 2. c. 25. s. 6.), treasurer, comptroller, or surveyor of the navy, (*id.*), clerk of the acts (*id.*); of the signing or vouching officers of His Majesty's navy, ships, or yards (*id.*); bankers' bills (41 Geo. 3. c. 57.); foreign bills (43 Geo. 3. c. 139.); lottery tickets (1 & 2 Geo. 4. c. 120. st. 11. 30 & 43.); pawnbrokers' duplicates; orders, or certificates to receive prize-money (49 Geo. 3. c. 123. s. 12. 39 & 40 Geo. 3. c. 99. s. 3.); or other instances of felonious forgeries, the party cannot be bailed.

(*y*) See Rex v. Clarke, 2 Stra. 1216. The statute 37 Hen. 8. c. 8. s. 2. deprived persons convicted of stealing any horse, gelding, mare, foal,



House-breaking.

Hue and cry. (z)

Kidnapping. (a)

Larceny. (b)

Lead, stealing, &amp;c. (c)

Lodgings, stealing from. (d)

Maiming. (e)

Manour, persons taken with. (f)

Manslaughter. (g)

By justices  
of the peace.When they  
cannot bail.

or filly, of the benefit of clergy; this statute, although repealed by the statute 1 Ed. 6. c. 12., is in fact virtually continued, as the latter statute contains provisions of a similar nature which excludes horse-stealers from the benefit of clergy, and of course from the right to be bailed.

In the *King v. —*, 2 Chit. Rep. 110., a prisoner brought up on a charge of horse-stealing was admitted to bail. In this case doubts, however, arose as to the property of the horse; and it appeared that the defendant had only taken it to ride a short distance, and then turned it loose.

(z) 2 Inst. 188. 2 Hawk. P. C. 98.

(a) See 43 Eliz. c. 18.

(b) But persons charged with petit larceny of articles not exceeding the value of 12*d.*, if they have not been previously guilty of any similar offence, may be bailed. 3 Edw. 1. c. 15. 4 Bl. Com. 299. Hawk. P. C. b. 2. c. 15. s. 50. Dick. Just. Bail, ii.

(c) Persons breaking into lead mines, or taking lead from thence, or aiding therein (25 Geo. 2. c. 10.); or stealing lead, or iron, affixed to houses (4 Geo. 2. c. 32., see 25 Geo. 2. c. 10.), are guilty of felony.

(d) The statute 5 W. & M. c. 9. s. 5., having made the offence of embezzling from furnished lodgings felony, the party charged must be committed.

(e) See 5 Hen. 4. c. 5. 22 & 23 Car. 2. c. 1. 9 Anne, c. 16. 9 Geo. 1. c. 22. 26 Geo. 2. c. 19. 43 Geo. 3. c. 58.

(f) 4 Bl. Com. 299. Burr. J. Bail, iv. 2 Hales, P. C. 133.

(g) But mere suspicion will not authorize the detaining of the party; and this offence is said not to beailable, although it appear to the justices that the killing was in self-defence (Bac. Ab. Bail, B. —. 2 Hale, P. C. 99. 101. 139. 2 Hawk. P. C. b. 2. c. 15. s. 33 & 34. Burn, Just. Bail, iv. Dickenson's, Just. Homicide, iii. & iv. See 1 Vent. 93. *Rex v. Keat*, 1 Salk. 103. *Armstrong v. Lisle*, 1 id. 61.); but this practice seems questionable, and, it would appear, that if it was shewn to have been by misadventure, or in self-defence, the justice may safely liberate the party on his finding sufficient sureties; and bail has been allowed on a committal by the coroner, where the depositions did not clearly establish that manslaughter had been committed. See 2 Stra. 911. 1242.

By justices  
of the peace.

When they  
cannot bail.

Murder. (*h*)

Navigable rivers, robberies on, &c. (*i*)

Negotiable securities, stealing of. (*k*)

Outlaws. (*l*)

(*h*) An individual charged with the death of another appears not to have been bailable before the passing of the statute West. 1. c. 15. which expressly declared him irreplevisable. But we have seen that the Court of King's Bench still retain their original discretionary power of admitting to bail, where there is any doubt either on the law or fact of the case. Hale's P. C. 98, 101. 2 Inst. 186. 4 Bl. Com. 298. 3 Salk. 56. 3 East, P. C. 163. Anon. 1 Salk. 104. Rex v. Acton, Stra. 851.

If a man be found guilty of murder by the coroner's inquest, the Court of King's Bench sometimes bail, because the coroner proceeds upon depositions taken in writing, which they might look into; otherwise, if a man be found guilty of murder by a grand jury, because the court cannot take notice of their evidence, which they by their oath are bound to conceal. Lord Mohun's case, 1 Salk. 104.

(*i*) By stat. 1 Geo. 2. c. 19. s. 2., persons demolishing locks, &c. upon navigable rivers; or stealing any goods, wares, or merchandizes, of the value of 40s., in any vessel on a navigable river (24 Geo. 2. c. 45. see 8 Geo. 2. c. 20. s. 1. 10 Geo. 2. c. 22. s. 5. 6 Geo. 2. c. 37. 4 Geo. 4. c. 46. s. 1.), are respectively declared to be felonies. With regard to the various works, of a limited and local nature, situated in different parts of the kingdom, concerning the destruction or injuring of which, especial provision is made by several statutes; the offences described in them are in general made felonies, punishable by transportation, and therefore not bailable.

(*k*) By 2 Geo. 2. c. 25. s. 3., stealing of exchequer orders or bills, South Sea bonds, bank notes, East Indian bonds, dividend warrants, bills of exchange, promissory notes, &c. &c. is made felony, as if goods of the like value were taken; and, therefore, in all such cases, a party cannot be liberated from custody.

In Ranson's case, (2 Russel on Crimes, 119. 2 Leach's Cr. Law, 1090. 1093. See Anon. Cor. Lord Ellenborough, C. J., Carlisle, 1802. cited in 2 Russel on crimes, 1119. 4 Bl. Com. 234. s. c. 2 Leach, Cr. L. 1061. n. (b). Clarke's case, 2 Russel on Crimes, 1116. 2 Leach, C. L. 1036.) it was decided, that notes of a country bank, paid in London and not re-issued, were held to retain the character, and fall within the description of promissory notes. In Phipoe's case, 2 Leach, C. L. 673. see 2 East, P. C. 599. Where a party was compelled by great violence to sign a promissory note, which had been previously prepared by the prisoner, who produced it and withdrew it again as soon as it was signed, the case was holden not to be within the statute 2 Geo. 2. c. 45. See Walsh's case, Leach, C. L. 1061. 2 Russel on crimes, 1122. 4 Taunt. 258.; in which it was argued, that a check upon a banker, is not within the statute 2 Geo. 2. c. 25.; but, as that case raised a point of greater importance, this ground of objection was not pressed. See 52 Geo. 3. c. 63.

(*l*) 4 Bl. Com. 298. 2 Hale's P. C. 132.

Personating. (*m*)

Polygamy, (*n*)

Rape. (*o*)

Receiving stolen goods. (*p*)

Records, stealing of. (*q*)

Revenue officer, obstructing of. (*r*)

Sacrilege. (*s*)

Sheep stealing (*t*)

By justices  
of the peace.

When they  
cannot bail.

(*m*) Persons imprisoned for acknowledging any fine or recovery in another's name, or any deed enrolled, or any statute, recognizance, or judgment, cannot be bailed, as they are by several statutes declared to be capital offences. 21 Jac. 1. c. 26. s. 2. 4 W. & M. c. 4. s. 4. 8 Geo. 1. c. 22. s. 1. 31 Geo. 2. c. 22. s. 77. 4 Geo. 3. c. 25. s. 15. 33 Geo. 3. c. 30. 4 Bl. Com. 128. See *Rex v. Robinson*, 1 Leach's Cr. Law, 37. 2 East, P. C. 1010.

(*n*) The offence of polygamy is by the stat. 2 Jac. 1. c. 11. made felony, and bail cannot be accepted. Vide *Lil. Abr.* 175.

(*o*) As the crime of rape is made a capital offence by the 18th of Elizabeth, c. 7. s. 1. it is of course not bailable; but the Court of King's Bench, have, under particular circumstances, admitted a party to bail who has been committed on such a charge. As where the prisoner had voluntarily surrendered himself, and the counsel for the prosecutrix did not object to his being admitted to bail, the court liberated him from custody. *Rex v. Baltimore*, 4 Burr. 2179. s. c. 1 Bl. 648.

(*p*) By the statute 3 & 4 W. & M. c. 9. s. 4. receivers of stolen goods may be prosecuted as felons. For although the 12th section of the statute 2 G. 3. c. 28 says, that the prisoner shall be transported for fourteen years to any of his Majesty's colonies or plantations in America; yet, by the 14th section of the same statute it is enacted, that any person stealing or unlawfully receiving stolen goods, knowing the same to be stolen, shall, on discovering two other offenders, be entitled to a pardon for *all such felonies*, and therefore such parties cannot be bailed. See *Rex v. Wyer*, 2 T. R. 77. East, P. C. 754. 1 Anne, stat. 2. c. 9. s. 2. 22 Geo. 3. c. 58. s. 1. 44 Geo. 3. c. 92. s. 8. Sed vide 2 East, P. C. 754. 39 & 40 Geo. 3. c. 87. s. 22.

(*q*) The stat. of Hen. 6. c. 12. s. 3. enacts, if any record, &c. of the King's courts of Westminster, be stolen, &c. or avoided, so that any judgment is thereby reversed, the offender shall be guilty of felony.

(*r*) Even before the 9th Geo. 2. c. 35., which declares that persons armed and disguised, or forcibly hindering revenue officers from discharging their duty, shall be guilty of felony, (see 8 Geo 1. c. 18.) prisoners committed under 13 & 14 Car. 2. c. 11. for either of these offences, until the next quarter session, could not demand to be bailed *as of right*. (*Rex v. Durin*, 5 Burr. 2641.

(*s*) 28 Hen. 8. c. 1. s. 3. 1 Edw. 6. c. 12. s. 10.

(*t*) 14 Geo. 2. c. 6.

By justices  
of the peace.

When they  
cannot bail.

Shooting, &c. wilfully at another. (u)

Shop lifting. (x)

Smuggling (y)

Transportation, returning from. (z)

Treason. (a)

(u) 9 Geo. 1. c. 22. 43 Geo. 3. c. 58.

(x) If the goods be of the value of 5s. and under 15*l.*, the punishment is transportation for life, or for not less than seven years, or imprisonment in the House of Correction for not more than seven years, and is created a felony, 1 G. 4. c. 117.; if of the value of 15*l.* or upwards, death, 10 & 11 W. 3. c. 23. Shops and warehouses, when they are mere depositories for goods, and not places for sale, were not within the meaning of 10 & 11 W. 3. c. 23. Stone's case, 1 Leach, Cr. Law, 334. Therefore, stealing a watch left at the shop of a watchmaker to be mended, or a shirt left at the shop of a draper, to be sent to the sempstress, is not within the act, for though it is a shop, yet *quoad* these articles, it is not a place of sale, *id.* 334. n. a.

(y) 52 Geo. 3. c. 143.

(z) See 5 Geo. 2. c. 33. s. 2.

(a) By stat. West. 1. (3 Edw. 1. c. 15) persons accused of treason cannot be bailed. (2 Inst. 189. 1 Hales, P. C. 98. 2 *id.* 134. 4 Bl. Com. 298.): but we have already seen that that act in mentioning the different jurisdictions which have power to bail offenders, does not extend to the Court of King's Bench, which may bail in all cases of treason at their discretion. (Latch 12. 5 Mod. 323. Prac. Reg. 64. 2 Inst. 185, 186. Hales, P. C. 98, 99. 104. 1 Bulst. 85., ante, p. 483.) A party committed for high treason in North America, who is only triable before the King's Bench, or under a special commission, cannot be admitted to bail under the Habeas Corpus act, by justices of gaol delivery, or discharged by their proclamation for want of prosecution. *Rex v. Platt*, 1 Leach, C. L. 159.

By the statute 31 Car. 2. c. 2., if any person committed for high treason or felony petition in open court, the first week in term, (*Anon.* 1 Vent. 346.) or first day of sessions (*Rex v. Yates*, 1 Show. 190. Holt, 83. s. c. Comb. 6 *Ld. Aylesbury's case*, 1 Salk. 103.), of *oyer* and *terminer*, or gaol delivery, to be tried, and be not indicted next term or sessions, the Court of King's Bench, on the last day of term, or the justices of *oyer* and *terminer* or gaol delivery, on the last day of sessions, are required on motion to bail him, unless an oath be made, that the King's witnesses could not be produced that term or session. But if this application be not made within the period stated (*Anon.* Vent. 346. *Ld. Aylesbury's case*, 1 Salk. 103. Fitzpatrick's case, *id.* 103. or at the place specified, (*Rex v. Yates*, 1 Show. 190. Holt, 83. s. c.), the party will not be excluded from the benefit of the statute.

Where an act of parliament is made, which suspends the power of bailing, the prayer will be equally effectual, if entered within the specified times, after such disability has been removed. *Ld. Aylesbury's case*, 1 Salk. 103. See Comb. 421. Holt, 84. Lutw. 12. Style, 488. And. 65. A prisoner who has been *admitted* to bail, is not entitled to

2dly, *Instances in which justices may bail in their discretion.*

Accessories. (b)

Affrays. (c)

Appellee. (d)

By justices  
of the peace.

When they  
may bail in  
their dis-  
cretion.

apply to the court under this act, to compel the prosecutor to proceed, or that he should be exonerated from the charge. *Rex v. Yates* 1 Show. 100. See 12 Mod. 117.

(b) By the statute W. 1. c. 15. persons accused "of command and force, or aid of a felony, shall be bailed," (2 Inst. 189. Hale, P. C. 100) unless there appears a strong presumption of guilt. (2 Hawk. P. C. c. 15. s. 53). In high treason there are no accessories, but all are principals. Every instance of incitement, which in other felonies would make a man an accessory before the fact, will, in treason, constitute him a principal. (2 Hawk. P. C. c. 29. s. 2. 5. 1 Hale, P. C. 613. Forts. 341. 4 Bl. Com. 35.) Although in high treason there are no accessories after the fact, those who in felony would be accessories after the fact being principals in high treason; yet, in their progress to conviction, they must be treated as accessories, and indicted specially for the receipt, &c. and not as principal traitors. (1 Hale, P. C. 238.) But in petit treason, murder, and felonies in general, there may be accessories, except only in those offences, which, by judgment of law are sudden and unpremeditated. (4 Bl. Com. 35. 1 Hale, P. C. 615. 2 Hawk. P. C. c. 29. s. 24.) Therefore, if A. be indicted for a murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. (1 Hale, P. C. 437. 450.) In cases of forgery it is stated generally, in the books, that all are principals, and that whatever would make a man accessory before the fact in felony, would make him a principal in forgery: (Moore, 666. 2 Hawk. P. C. c. 29. s. 2. 2 East, P. C. 937.) but it is conceived that this must be understood of forgery at common law, and where it is considered only a misdemeanor. (2 East, P. C. 973. Morris's case, 2 Leach, C. L. 1096.) In crimes under the degree of felony, there can be no accessories, but all persons concerned, if guilty at all, are principals. (1 Hale, P. C. 613. 4 Bl. Com. 36.)

(c) 1 Hawk. P. C. c. 63. s. 20. c. 65. s. 12. 4 Bl. Com. 145. But a magistrate ought to be very cautious how he takes bail, if a wound has been given, from which death may probably ensue. Hawk. P. C. B. 1. c. 63. s. 19. Bac. Ab. Bail, B.

(d) An appellee for murder, acquitted on indictment, will be bailed, unless the judge is dissatisfied with the acquittal. (2 Stra. 854.) But an appellee is notailable after conviction, on the indictment, unless delay is imputable to the appellant, even although pardoned. *Pyle v. Grant*, 2 Stra. 858. See 2 Inst. 188. 190. Hale, P. C. 1022. 2 Hawk. P. C. c. 15. s. 43. Where, on special verdict, in an indictment for murder, defendant is pardoned, and his plea allowed, he is not compellable to give bail to answer the heirs appeal, though beyond sea. (Stra. 1203.) See *Ashford v. Thornton*, 1 B. & A. 405.

By justices  
of the peace.

When they  
may bail in  
their dis-  
cretion.

Assault and battery. (e)

Compounding felonies. (f)

Conspiracy, persons charged with.

False pretences, obtaining goods by. (g)

Gaming. (h)

Indecencies. (i)

Perjury. (k)

(e) A prisoner accused of having inflicted a dangerous wound upon another, who is still alive, may be bailed, but the magistrate ought to exercise extreme caution, in consenting to the acceptance of bail, until it be clearly ascertained, whether the injury would occasion the death of the party. Hale, P. C. 99. Dalt. c. 12. s. 54. Hawk. P. C. 61. c. 63. s. 12. Bac. Ab. Bail, B. See *Rex v. Salisbury*, Str. 547. Where a woman was committed to Newgate for stabbing a person with a knife, so that his life was despaired of; and having obtained a *Habeas Corpus* out of the King's Bench, the day before she was to be brought up, she moved that a physician and surgeon of her own nominating might be permitted to be present at the dressing the party's wound, so as to be able to satisfy the court that he was out of danger, in order that they might bail her. *Sed per Curiam*. There never was a motion of this nature, especially so early as this is; the course is for the friends of the party injured, to lay his condition before the court, when they oppose the bailing; if they do not do it, then we may order such an attendance for our own satisfaction; but at present the defendant has no right to demand it.

In the King's Bench a motion to bail a defendant for an assault, must be made before a judge at chambers. *Rex v. ———*, 2 Chit. Rep. 110.

(f) Compounding felony was formerly considered to criminate the party in an equal degree with the principal felon; but such an offence is now only punished with fine and imprisonment, unless it be accompanied with maintenance afforded to the felon, which renders the party an accessory after the fact, and therefore, such offenders may be discharged out of custody, on entering into a proper recognizance. See 1 Hawk. P. C. c. 59. s. 5. 4 Bl. Com. 133.; the same rule, of course, applies to compounding minor offences, 18 Eliz. c. 5. s. 4. 4 Bl. Com. 136.

(g) 30 Geo. 2, c. 24. s. 2. In this case, it seems discretionary with one justice to take bail. 1 Chit. Crim. Law, 97.

(h) See 9 Ann. c. 14. s. 5. 18 Geo. 2. c. 34. s. 8.

(i) See 1 Hawk. P. C. c. 5. s. 4. 1 East, P. C. c. 1. s. 1. 4 Bla. Com. 65. *Rex v. Sidney*, Sid. 168. 1 Keb. 620. s. c. *Rex v. Crunden*, 2 Campb. 89.

(k) The crime of perjury is in general aailable charge, unless the accusation bring the party within any of the statutes which declare it to be felony. The same rule applies with regard to the false affirmation of a Quaker. 22 Geo. 3. c. 46. s. 36.

Theft bote. (*l*)

Vagrancy. (*m*)

By justices  
of the peace

When they  
ought to  
bail.

3dly, *Instances in which justices ought to bail.*

Barretor. (*n*)

Blasphemy. (*o*)

Dead bodies, stealing of. (*p*)

Dog stealing. (*q*)

Forestalling, engrossing, and regrating. (*r*)

Game. (*s*)

Libel. (*t*)

(*l*) By 4 Geo. 1. c. 2. s. 4. if any person take money or reward directly or indirectly, under pretence, or upon account of helping any person to any stolen goods or chattels, (unless such person apprehend the felon who stole the same, and cause him to be tried, and give evidence against him,) he shall be guilty of felony, according to the nature of the felony committed in stealing such goods, and as if such offender had stolen the same; and therefore, the rules as to whether a party can or cannot be holden to bail, are regulated by that fact.

(*m*) It is in the discretion of the magistrate, before whom any person apprehended as a rogue or vagabond, or idle and disorderly person, shall be brought, either to commit or discharge him, although a positive act of vagrancy be actually proved. But it is also in the power of the justice, on discharging any such person, to bind him in a sufficient recognizance, to appear before the justices at their next general or quarter sessions of the peace, to answer such charge or charges as may be exhibited against him. (3 Geo. 4. c. 40. s. 6.) Where, however, the party is committed for a certain time, it is a commitment in execution, and bail will not be allowed. *Rex v. Brooke*, 2 T. R. 190.

(*n*) A barretor isailable, as evidently appears by the terms of the warrant issued against him, which is, "that he be brought before a justice of the peace, there to answer the complaint, and to find sureties for his personal appearance at the next quarter sessions." (1 Burr. 179.)

(*o*) See 1 Edw. c. 1. 1 Eliz. c. 2. 3 Jac. 1. c. 21. 9 & 10. W. 3. c. 32. 53 Geo. 3. c. 160.

(*p*) See 2 T. R. 733. 2 East, P. C. 652. *Lynn's case*, 1 Leach, Cr. L. 497. 4 East, Rep. 463.

(*q*) 10 Geo. 3. c. 18.

(*r*) On this subject in general, see Mr. Godson's Introductory Book, to his treatise on Patents and Copyright.

(*s*) Persons killing game in the night, by entering open or enclosed lands, armed with a gun, bludgeon, or offensive weapon, may be bailed, as the offence only amounts to a misdemeanor. (See 9 Anne, 21. s. 3. 57 G. 3. c. 96. s. 1.)

(*t*) It is now clearly settled, that a magistrate has the power of apprehending, and of requiring bail from a libeller, and in default of its being given, of committing him. *Butt v. Conant*, 1 B. & B. 548. 1 Gow, N. P. 84. s. c. 4 B. Moore, 195. s. c.



## SECTION V.

## BY JUSTICES OF GAOL DELIVERY.

JUSTICES in *eyre* and of gaol delivery may bail persons, (not being considered irreplevisable by West 1. c. 15.) convicted before them of homicide by misadventure or self-defence, (*u*) or of manslaughter, under peculiar circumstances; (*x*) and where they are invested with the power of admitting persons to bail, they may exercise that authority as well after the expiration as during the continuance of the assizes. (*y*)

A prisoner committed to Newgate for high treason in North America, being only triable before the King's Bench, or under a special commission, cannot be admitted to bail under the *habeas corpus* act, by justices of gaol delivery, or discharged by their proclamation for want of prosecution. (*z*)

## SECTION VI.

## BY THE SHERIFF.

AT common law, the sheriff, as a principal conservator of the peace, (*a*) might, either by writ or *ex officio*, have discharged any person upon sufficient security being given, to appear to answer the indictment before him at

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(*u*) Poph. 96. 2 Crompt. 154. a. Hale, P. C. 101. 1 Bac. Abr. 223. 2 Hawk. P. C. 106. 111.

(*x*) 2 Hawk. P. C. 106. 114. Crompt. 153, 4.

(*y*) 2 Hawk. P. C. 106.

(*z*) Rex v. Platt, 1 Leach, Cr. Law. 157.

(*a*) See 2 Inst. 190. F. N. B. 250. H. 106.



his tourn for felony, or any otherailable offence. (b) But it appears from the ancient statutes relative to the criminal jurisdiction of the sheriff, that the extortions and oppressions frequently committed by him and his officers rendered that power so obnoxious, that the legislature in every reign gradually abridged some part of his authority, and increased the jurisdiction of justices of the peace, until finally his cognizance of criminal offences was expressly, and his power of bailing at the tourn incidentally, transferred to the justices of the peace by the statute 1 Ed. 4. c. 2. which enacts, "that such as shall be indicted or taken by the keepers of the peace, shall not be let to mainprize by the sheriffs, and that the sheriff shall deliver all indictments and presentments to the justices of the peace at their next sessions."

By the  
sheriff.

It has indeed been supposed, that the sheriff may accept a recognizance, though not a bond for the appearance of the criminal; but it would seem, from the authorities, that he cannot, under any circumstances, set a prisoner at liberty on bail, whom he has arrested on a criminal charge. (c)

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## SECTION VII.

### BY THE MARSHAL OF THE KING'S BENCH.

By the statute 5 Ed. 3. c. 8. the Marshal of the King's Bench is prohibited from bailing persons indicted or appealed of felony, on pain of half a year's imprisonment and ransom. (d)

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(b) 2 Hawk. P. C. 93.

(c) See 2 Saund. 59. a. Bengough v. Rossiter, 2 H. Bl. 418. 4 T. R. 505. s. c. Lamb. 1. 15. Norfolk v. Elliott, 1 Lev. 209.

(d) F. N. B. 2511.

## SECTION VIII.

## BY CONSTABLES.

THE only regulations respecting the authority to accept bail, which remain to be considered, are contained in the provisions of the stat. 1 & 2 Geo. 4. c. 218. commonly denominated the Metropolis Police Act. The 28th section of it enacts, that "within the limits and parishes to which the jurisdiction of the justices thereby recognized extends, it shall be lawful for the constable or headborough attending at any watchhouse between the hours of eight in the afternoon and six in the forenoon, to take bail by recognizances, without fee or reward, from any person who shall be brought into his custody within the said hours, without the warrant of a justice, charged with any petty misdemeanor, if such constable shall deem it prudent to take such bail for the appearance of such person before the justices, at the said public office in Bow-street, or at one of the said police offices, to be specified in the recognizance for examination, at the hour of ten in the forenoon next, after such recognizance shall be taken, unless that hour shall fall on a Sunday, or one of the days of absence allowed by this act, and in that case, at the like hour on the succeeding day; and that every recognizance so to be taken, shall be of equal obligation on the parties entering into the same, and liable to the same proceedings, for the estreating thereof, as if the same had been taken before one of His Majesty's Justices of the peace; and the constable or headborough shall enter in a book to be kept for that purpose in every watch-house, the names, residence, and occupation of

the party, and his sureties entering into such recognizance, together with the condition thereof, and the sums respectively acknowledged, and shall lay the same before such justice, as shall be present at the time and place, when and where the party is required to appear; and if the party does not appear at the time and place required, or within one hour after, the justice shall cause a record of the recognizance to be drawn up, to be signed by the constable or headborough, and shall return the same to the next general or quarter sessions of the peace, with a certificate at the back thereof, signed by such justice, that the party has not complied with the obligation therein contained, and the clerk of the peace shall make the like estreats and schedules of every such recognizance, as of recognizances forfeited in the sessions of the peace; and if the party not appearing shall apply by any person on his behalf to postpone the hearing of the charge against him, and the justice shall think fit to consent thereto, the justice shall be at liberty to enlarge the recognizance to such further time as he shall appoint; and when the matter shall be heard and determined, either by the dismissal of the complaint, or by binding the party over to answer the matter thereof at the sessions or otherwise, the recognizance for the party's appearance before the justices shall be discharged without fee or reward."

By con-  
stables.



## CHAPTER III.

OF THE NUMBER AND AMOUNT OF, AND WHO MAY OR MAY NOT BE BAIL, AND WITHIN WHAT TIME A PARTY MAY BE BAILED.

Of the  
number of  
the bail

THE number of bail in criminal proceedings is the same as in civil cases, and therefore two are generally required; but it is said not to be usual for the Court of King's Bench to admit to bail on a *habeas corpus* on a commitment for treason or felony, without the production of four responsible sureties; and in either case, where in that court a notice of bail is required, it would seem that the number of the bail must be specified in the notice, otherwise the court will reject the application (a)

Of the  
amount  
of bail.

The sureties ought to be bound in a sum certain, and for a capital offence the amount demanded should not be less than 40*l*. It however seems, that the penalty to be mentioned in the recognizance, is not reduced in practice to a precise specified sum, which must be adhered to in all cases; but the magistrate has a discretionary authority to order a sum to be inserted, according to the affluence and rank of the prisoner, and the nature and enormity of the offence. (b)

The custom of making "body for body," the penalty in the recognizance, is now become obsolete. When it was usual to take the recognizance in this form, the bail were not, in case the instrument was forfeited, liable, as might be inferred from the literal interpretation of the

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(a) Bac. Ab. Bail, F. Com. Dig. Bail, K. 1. Hawk. P. C. b. 2. c. 15. s. 4. n. 1.

(b) 2 Hawk. P. C. 88. Hale, P. C. 97. Dalt. c. 14. 2 Wils. 159.

words, to suffer a similar punishment to that which the principal, if found guilty, would have incurred, but were only subjected to the payment of a fine. (c)

Of the  
amount  
of bail.

Although the warrant of committal by the magistrate be informal, and the nature of the defendant's crime be not accurately defined, yet, if sufficient appear on the depositions returned with the committal, to shew that he has at least been guilty of a heinous offence, the Court of King's Bench will not release him from custody, without adequate security for his appearance. In a recent case of this nature, the prisoner was ordered to enter into a recognizance, himself in 1000*l.*, and four sureties in 500*l.* each. (d) So a defendant, who was convicted of printing and publishing a seditious libel, and who appeared when he was brought up for judgment to be in a very indifferent state of health, was admitted to bail, upon finding sureties, himself in 2000*l.*, and two others in 1000*l.* each. (e)

After a defendant has been admitted to bail on a criminal charge, the court will not increase the bail, on an affidavit disclosing facts in aggravation of the original offence, and rendering the enormity of it greater than had appeared to the court, when they granted the rule for the allowance of bail. (f) In this case, Mr. Justice Bayley said, "that he doubted how the defendants, having been once arrested, could be arrested again, which in fact must be done to compel them to give additional bail."

Every individual may, in criminal cases, become bail, who is a housekeeper, and possessed of property equal

Who may  
or may not  
be bail.

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(c) *Rex v. Dalton*, 2 *Stra.* 911. 1 *Barnard*, 41. *Hale*, P. C. 125.  
2 *Hawk.* P. C. 125.

(d) *The King v. Judd*, 2 *T. R.* 255. 1 *Leach*, Cr. L. 486.

(e) *Rex v. Bishop*, 1 *Str.* 9.

(f) *Rex v. Salter*, 3 *Chit. Rep.* 109.

Who may  
or may not  
be bail.

to the responsibility incurred, without reference to many of the numerous qualifications, which are uniformly required in civil proceedings; and although it is a rule strictly attended to in civil cases by all the courts, that no attorney practising as such, shall be bail in any suit or action; (g) yet in criminal cases, the same reasons which dictated the introduction of that prohibitory rule, do not apply, and therefore the defendant's attorney is competent to be bail for him. (h)

A person convicted of an infamous crime, as perjury, cannot be admitted as an adequate surety; (i) so a married woman cannot be bound by recognizance, because it is not capable of being estreated. (k)

It has been decided, that a justice of the peace, as a substitute for bail, may take money *in deposito*. (l)

At what  
time a party  
may be  
bailed.

If an offence be bailable, and the party, at the time of his apprehension, be unable to obtain immediate sureties, he may, at any time, on producing proper persons as his sureties, be liberated from confinement. (m)

After the recognizance has been entered into, the justice before whom the transaction takes place, will issue his warrant, called a *liberate*, to the gaoler, to discharge the prisoner.

(g) Vide ante, p. 269 to 271.

(h) In *Rex v. Bowes*, cited in *Hawkins v. Magnall*, 2 Doug. 466. n. The defendant was carried down to Bedford assizes, under a rule of court, before Ashurst, Justice, to give bail on articles of the peace, exhibited against him by his wife, Lady Strathmore. One of the bail was objected to as being his attorney, but Ashurst, Justice, held, that the rule did not apply in criminal cases; the other bail, however, appearing insufficient, the defendant was remanded.

(i) *Rex v. Edwards*, 4 T. R. 440.

(k) *Styles*, 369. Hawk. P. C. b. 2. c. 15. s. 84: *Bennet v. Watson*, 3 M. & S. 1.

(l) *Moyser v. Gray*, Cro. Car. 446.

(m) *Rex v. Shebbeare*, 1 Burr. 460. Hawk. P. C. 62. c. 16. s. 1. n. 1. 1 Hale, P. C. 122.


## CHAPTER IV.

## OF THE NOTICE AND EXAMINATION OF BAIL.

NOTICE of bail is not in criminal cases in general required to be given to the prosecutor. Bail may be therefore taken in court, or before a judge of the King's Bench, or a justice of the peace, without a preliminary opportunity being afforded to make inquiries respecting their responsibility. Notice of bail.

There is however an exception to this general rule, by the enactment of the stat. 30 Geo. 2. c. 24. s. 17. which requires that no persons charged on oath with being guilty of obtaining any money or goods under false pretences, or of any of the offences punishable by this act, and which shall require bail, shall be admitted to bail before twenty-four hours notice at least, shall be proved by oath to have been given in writing to the prosecutor, of the names and places of abode of the persons proposed to be bail for any such offender or offenders, unless the bail offered shall be well known to the justice or justices, and he and they shall approve of them; and every such offender and offenders who shall be bound over to the general quarter sessions of the peace or gaol delivery of the county, city, or town, wherein the offence charged on him shall have been committed, to answer any such offences punishable by this act, shall be tried at such general quarter sessions of the peace, or sessions of oyer and terminer and gaol delivery, which shall be held next after his, her, or their being apprehended, unless the court shall think fit to put off the trial on just cause made out to them.

Notice of  
bail.



Where an indictment is found at the sessions, and the prosecutor moves for a warrant, the court, when they grant it, will make a note, by way of order, at the foot of the warrant, that the defendant shall give twenty-four hours notice of bail to the prosecutor, which is sometimes extended to forty-eight hours, according to the circumstances of the case; and a judge or justice of the peace, after the termination of the session, will, upon the production of a certificate of a bill having been found, grant a warrant on a similar order.

But where the defendant, in order to avoid being apprehended under a warrant upon an indictment found or preferred, voluntarily attends before a magistrate, and offers bail to answer the supposed offence, it is said that no notice of bail is requisite. (a)

Examina-  
tion of bail.

As in criminal cases no justification is requisite, the bail are absolute in the first instance; the sureties may be, however, examined on oath by the magistrate, by whom the bail are to be accepted, concerning the sufficiency of their property; and if the accused be discharged upon insufficient sureties, he may be compelled either by the magistrate who directed that he should be liberated, or by any other justice of the peace, who would originally have had power to bail him, to find fresh securities. (b)

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(a) Cro. C. C. 15, 16.

(b) 2 Hale, P. C. 125. Hawk. P. C. Ba. B. K. b. 2 c. 15. Dick. J. Bail.



## CHAPTER IV.

## OF THE RECOGNIZANCE.

In the former chapters we have examined the cases in which bail will be allowed, and the number of persons, and the qualifications they must possess, in those instances in which that privilege is granted to the accused; it is now proposed to investigate the nature of the instrument by which the liability is created.

It may be advisable to subjoin, in the note, the general form of the recognizance. (a)

Form of the  
recogni-  
zance.

(a) County of } Be it remembered that, on the day of in the year  
                  } of the reign of our Sovereign Lord, George the Fourth,  
by the grace of God, of the United Kingdom of Great Britain and Ireland,  
now King, O. O. of yeoman, A. B. of yeoman, and C. D. of yeo-  
man, personally came before us W. D. and D. W. two of His said Ma-  
jesty's justices of the peace, in and for the said county of , and sever-  
ally and respectively acknowledged themselves to be indebted to our  
said Sovereign Lord the King, in the manner and form following: (that  
is to say) the said O. O. in 20*l.* of good and lawful money of Great  
Britain, and the said A. B. and C. D. in 10*l.* each of like lawful  
moneys, to be respectively levied of their several goods and chattels,  
lands and tenements, to the use of our said Sovereign Lord the King,  
his heirs and successors, if the said O. O. shall make default in the  
performance of the condition underwritten. Taken and acknow-  
ledged the day and year above written. Before us, W. D.  
D. W.

The condition of this recognizance is such, that if the within (above) bound, O. O. shall personally appear before the justices of our Sovereign Lord the King, assigned to keep the peace within the said county, and likewise to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county, committed at the next general quarter session of the peace (or before His Majesty's justices of gaol delivery; at the next general gaol delivery), to be holden in and for the said county, then and there to answer to our said Sovereign Lord the King, for and concerning the felonious taking and stealing of the property of M. M. of , yeoman, with the suspicion whereof the said O. O. stands charged before us the said justices, and to do and receive what shall by the Court be then and there enjoined him, and shall not depart the court without licence, then the above (within) written recognizance shall be void. [Note.—The recognizance of bail taken in the King's Bench upon a *habeas corpus* is to appear at the next gaol delivery, for the proper county and other court in which the defendant is to be tried, Gilb. L. & E. 4.]

Form of the  
recogniz-  
ance.

The principal and bail usually acknowledge themselves respectively to owe the King a named sum, which it is said should not in general be less than 40*l.*, payable on the contingency of the defendant's omitting to appear at the appointed place of trial.

But if the party be a feme covert, or infant, and, therefore, incapable of entering into a recognizance, or if already in gaol, or from any cause precluded from attending, the sureties alone must be named in the recognizance; and the whole sum, intended to be inserted as the security for the appearance of the offender, must be equally apportioned between them; and, it seems, that the court may in all cases dispense with the principal's joining in the acknowledgment. (*b*)

If the recognizance be to answer generally, it includes every species of crime of which the culprit may be accused; and although an information may have been commenced, and a *nolle prosequi* entered in consequence of some irregularity or defect in the proceedings, the bail will not be exonerated from their responsibility; and, therefore, where it is intended that the recognizance should only have relation to a particular crime, that transgression should be distinctly specified. (*c*)

Condition of  
the recog-  
nizance.

The bail are not liable as in civil cases to stand in the place of their principal, in the event of his non-appearance and non-conformity with the condition of the recognizance; but are only bound in a certain specified sum, which then becomes forfeited, and attaches upon their lands, tenements, and personal property.

Before  
whom  
taken.

The recognizance may be entered into in court, or in some particular cases the bail may be accepted by the sheriff, or coroner, or other magistrate; but in prac-


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(*b*) 2 Hawk. P. C. 115.

(*c*) Regina v. Ridpath, 10 Mod. 152.

tice, most usually by the justices of peace. And although the jurisdiction of the justices is in general confined to the limits of their own county; yet, it is said, that recognizances *voluntarily* taken before them in any other place are valid. (d)

Before  
whom  
taken.



The recognizance entered into by the bail need not be signed by any of the parties bound by the condition. (e)

Signing of  
the recog-  
nizance.

These documents are never delivered up by the justices of the peace to the parties interested, but are returned to, and filed at the Sessions, according to the provisions of the statutes of Philip and Mary, (f) which enact, that the justices, who bail or commit for manslaughter or felony, are to certify the recognizance to the general gaol-delivery of the county where the defendant is to take his trial. But although the words of the statute are "at the next general gaol delivery;" yet, for petty larcenies, and small felonies, the party accused may be tried at the quarter sessions, and the recognizances must be of necessity certified there. (g) And the examination and recognizances taken by justices in one county upon a backed warrant, may be by them certified into another county, and there read and given in evidence against the prisoner. (h)

Certifying  
the recog-  
nizance.

Anciently the justice used personally to attend with the recognizance, in order to certify it; but it is now handed over by the clerk of the justice to the clerk of the peace or assizes.

(d) 3 Burr. 14. 2 Hawk. c. 37.

(e) Dick. Sess. 87. Dick. J. Recog. Hawk. P. C. b. 2. c. 15. s. 83.

(f) 1 & 2 Ph. & Mary, c. 13. s. 4 and 2 & 3 Ph. & M. c. 10. s. 2.: and see 38 Geo. 3. c. 52.

(g) Dalt. J. c. 164. see Burn's, J. Examination.

(h) Dalt. J. c. 164. 24 Geo. 2. c. 55. 44 Geo. 3. c. 92.

## CHAPTER VI.

OF THE PUNISHMENT FOR TAKING INSUFFICIENT BAIL, AND  
FOR GRANTING AND REFUSING BAIL ERRONEOUSLY.

Of taking  
insufficient  
bail.

IF a party, who has been bailed by insufficient sureties, do not appear according to the condition of the recognizance, the magistrate who bailed him is amenable to the justices of assize; (a) but, if he afterwards appear, it seems that the justice who accepted the inadequate bail is excused, the object of requiring such security being accomplished. (b)

But extreme caution should be observed, that under pretence of demanding sufficient sureties the magistrate does not require bail to such an amount as is equivalent to an absolute refusal of bail, and in its consequences, leads to a protracted imprisonment. (c)

Of granting  
bail errone-  
ously.

Liberating a person notailable by law, from illegal and corrupt motives, is a misdemeanor; (d) and the Court of King's Bench will grant a criminal information against the magistrate who has been guilty of such a transgression. (e)

It has been said, that although the justice did not know that the party was committed by another magis-

(a) If any justice of the peace shall take bail where he ought not, or wittingly or willingly take insufficient bail, and the party appear not, the said justice not only to be proceeded against according to law, but likewise to be complained of to the Lord Chancellor that he may be turned out of his commission. Sixth order of the judges, to be observed by justices of the peace, O. B. 16 Car. 2. Kelyng's Rep. 3.

(b) Hawk. P. C. b. 2. c. 15. s. 6. 4 Bl. Com. 297. Bac. Ab. Bail, G.

(c) Vide post. (d) 2 Hawk. P. C. 89.

(e) Rex v. Brooke, 2 T. R. 190. The court on granting such information will not require the prosecutor to give security for costs, in case the defendant should be acquitted, beyond the extent of the recognizance, as 20*l.* required by 4 & 5 W. & M. c. 18. s. 2.

trate, for a cause notailable by law; as the offence was not expressed in the *mittimus* to be irreplevisable, it is no excuse for improperly discharging the prisoner, as justices before they bail under a commitment, must at their peril inform themselves of the cause for which the party was in custody. (f) Where, therefore, a person had been committed, on suspicion of stealing a horse, and the owner had been bound over to prosecute; but, afterwards, upon examining two other persons, the accused had been admitted to bail, who did not afterwards appear, the court granted an information against the magistrate. (g)

Of granting  
bail errone-  
ously.

The statutes, West. 1. c. 15., 27 Edw. 1. c. 3., 4 Edw. 3. c. 2., and 1 & 2 Ph. & M. c. 18., have also subjected justices to severe penalties, for improperly admitting parties to bail. (h)

To deny, or obstruct a party from being bailed, where that security ought to be accepted, and has been actually tendered, is an offence punishable by indictment as well as by action at law. (i) The principal legislative provisions relating to this offence are the statute of Westminster the First, c. 15.; and the *habeas corpus* act, 31 Car. 2. c. 2. By the former act, it is provided, "That if any withhold prisoners replevisable after they have offered sufficient surety, he shall pay a grievous amercement to the King; and if he take any reward for the

Of refusing  
bail errone-  
ously.

(f) Dalt. c. 114. 2 Hawk. P. C. 99.

(g) *Rex v. Clarke*, 2 Str. 1216. So a justice who had taken a recognizance from his son of 10*l.*, and 5*l.* a piece from two sureties, to appear at the next assizes, the son being accused of having dangerously wounded a man, who died before the commencement of the assizes, was fined 200*l.* 2 Blackerby, 57.

(h) If the keeper of a prison bail any notailable, he shall lose his fee and office; if another officer, he shall have three years' imprisonment; and pay a fine at the King's pleasure. 3 Edw. 1. c. 15.

(i) *Regina v. Tracy*, 6 Mod. 179. 3 B. & P. 551. *Osborn v. Gough*, Hawk. P. C. b. 2. c. 15. s. 14. So if several persons join in a conspiracy to persuade the justice to refuse the bail when sufficient, they may be indicted. *The Queen v. Tracy*, 6 Mod. 179.

Of refusing  
bail errone-  
ously.



deliverance of such, he shall pay double to the prisoner, and also shall be in the great mercy of the King." And by the latter statutes it is enacted, "That justices of the assize shall enquire if sheriffs, or any other, have offended in any thing contrary to the said statute of Westminster; and whom they shall find guilty, they shall punish in all things according to the form of the statute."

The accused not offering bail will, however, justify a commitment; and there is no necessity, in order to render such commitment legal, that the party should have been first requested to procure sureties, and a distinct refusal to obtain them given to the magistrate. (k)

In cases of difficulty it may be, in general, more advisable that justices should reject than accept bail; as we may recollect that the Court of King's Bench, or any judge thereof in vacation, may in their discretion admit persons to bail in all cases whatever, although committed by justices of the peace, or any other tribunal.

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## CHAPTER VII.

### OF THE PRIVILEGES AND LIABILITY OF THE BAIL, AND WHAT IS A FORFEITURE OF THE RECOGNIZANCE.

Privileges of  
the bail.

It is essential to the security of the bail that the principal should be compelled to appear at the time and place specified in the recognizance. To enable the bail to effectuate this purpose, they are invested with the same unrestricted authority over the person of the defendant, as we have already seen is conferred upon them in civil cases. Indeed, in criminal proceedings, the power

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(k) Hawk. P. C. 97. 2 Hale, P. C. 123.

possessed by the bail, in obliging the accused to fulfil the terms of the recognizance, should be even more unlimited, as by not rendering him they not only forfeit to the public the penalties imposed by law, but perhaps create, in crimes of a flagrant nature, an impossibility of the ends of justice being accomplished. Hence they may seize his person at any time (as on a Sunday), or at any place, to carry him to a justice to find new sureties, or be committed in their discharge, (a) and in surrendering the principal they may command the co-operation of the sheriff, and any of his officers.

Privileges of  
the bail.

The acquittal, or condemnation of the principal, does not affect the situation of the bail; for their responsibility in either case terminates, if the prisoner duly appear to answer the charge brought against him. (b)

Liability of  
the bail,  
and what is  
a forfeiture  
of the recog-  
nizance.

If the recognizance be conditioned that the prisoner shall appear on the first day of a particular term, in the Court of King's Bench, to answer to an information, and not to depart till discharged by the court; and a *nolle prosequi* is subsequently entered on that information, and another exhibited to which he refuses to appear, a forfeiture of the recognizance is incurred. (c)

It appears that the right of the bail to be discharged is not affected by the conduct of the principal on his trial. If he, therefore, stand *mute*, they are not liable on the recognizance, although a contrary inference might be drawn from the terms of that instrument. (d)


(a) Anon. 6 Mod. 231. Rol. Rep. 99. Bail in a civil action may have an *habeas corpus* in some cases, to render the defendant in custody on a criminal charge, in order to be relieved from further liability on their recognizance. See Taylor's case, 3 East, 232. Brandon v. Davis, 9 id. 154. Daniel v. Thompson, 15 id. 78. Walsh v. Davies, 2 N. R. 245.

(b) 1 Wils. 315.

(c) 2 Haw. 116. 1 Bac. Abr. 231. Regina v. Ridpath, 10 Mod. 152. Fortes. 358.

(d) 1 Bac. Abr. 231. 2 Inst. 150. 4 id. 178. 2 Hawk. P. C. 115.

Liability of  
the bail,  
and what is  
a forfeiture  
of the recog-  
nizance.



Where a defendant indicted in the Court of King's Bench, was bailed on the indictment; and likewise, in a civil action then pending against him in the Common Pleas, rendered himself, in discharge of his bail in the latter, to the Fleet, and from thence removed himself by writ of *habeas corpus* to the King's Bench, and escaped; his bail to the indictment applied to the court that their recognizance might not be estreated, suggesting that he was taken out of their custody by his commitment to the marshal; but the application was refused, the court observing, that they might have surrendered him at any time in their discharge. (e)

In *Rex v. Eyres*, (f) it is reported, that where a recognizance had been forfeited, and the sheriff had levied 20*l.* on the goods of one bail, and returned that the other had nothing whereof, &c.; a motion being made to tax the costs, and that the same might be paid to the prosecutor out of the sum levied, a rule was granted for the defendant and bail to shew cause why the amount of the taxed costs should not be paid to the prosecutor, and the surplus returned to the person on whom the sum had been levied. (ff)

If the principal do not appear, and the recognizance be forfeited and the penalty paid by the bail, yet the principal continues amenable to the law, whenever he can be taken; for the penalty in the recognizance is only intended to compel a due observance of its condition, and has no connexion with the liability of the principal.

It has been remarked, (g) that if the bail have been compelled to pay the penalty, in consequence of the re-

(e) Anon. 1 Salk. 105. (f) 4 Burr. 9119.

(ff) This was recommended by Lord Mansfield as the easiest method; for, he observed, "It is not the King's money, he has no interest in it, he is only trustee for the party on a forfeited recognizance."

(g) Highmore on bail, 204.



cognizance becoming forfeited, that they cannot sustain an action against him for money paid to his use; but this opinion would appear to be unfounded, as it is now fully settled, that where a person is bail for another, he is entitled to recover all the expenses he has incurred, incidental to that situation. (*h*)

Liability of  
the bail,  
and what is  
a forfeiture  
of the recog-  
nizance.

The statute 38 Geo. 3. c. 52. s. 5. enacts, "That every recognizance for the appearance to answer an indictment, for any offence charged to have been committed within the county of any city or town corporate, shall be forfeited, if the prosecutor shall, ten days previous to the holding of the next court of oyer and terminer, and gaol delivery, in the next adjoining or other county, give notice to the person bound in such recognizance, of the intention to prefer such indictment in the next adjoining, or other county, if the party bound in such recognizance shall not appear; but if he shall appear, then the recognizance shall be discharged, the same as if the party bound thereby had complied with the terms thereof." And by the sixth section of the same statute, it is provided, "That, leaving such notice at the last place of abode of the party bound by the recognizance, ten days before the holding of the sessions, shall suffice; and that the recognizance shall not be estreated, or returned into the Exchequer, until the next following session, in order that such recognizance may be discharged, in case the party bound shall shew sufficient cause for discharging the same."

It seems that the defendant cannot be compelled to appear upon the recognizance, except on the particular day on which he is by the terms of that instrument bound to attend; and if he is required to be present in

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(*h*) *Fisher v. Fallows*, 5 Esp. 171., and see ante, p. 423.

Liability of  
the bail, and  
what is a  
forfeiture of  
the recogni-  
zance.

court upon any other day, express notice to that effect must be given. (i)

The bail are not entitled to have their recognizance discharged, without submitting to the terms of paying the costs incurred. (k)

## CHAPTER VIII.

### OF BAIL ON WRIT OF HABEAS CORPUS.

As *magna charta* only declared in general terms, "that no individual should be imprisoned contrary to law;" the *habeas corpus* act was introduced not only to afford a more adequate security against every species of illegal commitment, but to punish those who, by an unconstitutional exercise of their power, endeavoured to detain in prison the objects of their oppression. Where a party is illegally committed, and entitled to be discharged or bailed by a superior jurisdiction, he may in every instance obtain relief by a writ of *habeas corpus*; which, it seems, is the only remedy, as a writ of *certiorari* would be irregular. (a)

When  
and how  
granted.

The writ of *habeas corpus*, although a writ of right, is not grantable of course, but only on motion in term time, upon the statement of a probable cause, verified by affidavit; (b) and where such an application is made to

(i) *Rex v. Adams*, Ca. Temp. Hard. 237. 3 Hawk. P. C. 229. s. c. n. See *The Queen v. Drummond*, 11 Mod. 200.

(k) *Rex v. Lyon*, 3 Burr. 1461. See *Rex v. Finmore*, 8 T. R. 409. *Rex v. Turner*, 15 East, 570.

(a) Com. Dig. Hab. Corp. C. *Rex v. Bowen*, 5 T. R. 158. Nol. Rep. 186. s. c.

(b) *Hobhouse's case*, 3 B. & A. 420. 2 Chit. Rep. 207. s. c. In *Wilmot's Opinions and Judgments*, p. 87., it is stated, that there is no such thing in the law as writs of grace and favour issuing from the judges.

a single judge in vacation, a copy of the commitment, or an affidavit of the refusal of that document must be laid before him, to guide his judgment and discretion. (c)

When  
and how  
granted.

The twenty-first section of the *habeas corpus* act, (d) directs, that when any person shall be committed or detained for any crime, unless for treason or felony, plainly expressed in the warrant of commitment; or as accessory, or on suspicion of being accessory before the fact to any petit treason or felony, or upon suspicion of such petit treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process; the individual conceiving that he has a right to be liberated, may appeal to the Lord Chancellor, or Lord Keeper, or any of the twelve judges in vacation, who, upon view of the copy of the warrant of commitment and detainer, or upon oath made that such copy was denied, are hereby authorized and required, upon request made in writing by such person or persons, to grant a *habeas corpus*, under the seal of the court over which the judge has jurisdiction, directed to the officer in whose custody the party is committed or detained, which shall be returnable *immediate* before the person who awards it, or any other of the judges. (e)

Where the accuser has omitted to conduct the prosecution with proper diligence, the courts will in general immediately discharge the prisoner. Therefore, even in

In case of  
delay of  
prosecution.

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They are all writs of right, but they are not all writs of course; and in p. 88, it is said, that writs of *habeas corpus* upon imprisonment for criminal matters, were never writs of course. They always issued upon a motion founded on a copy of the warrant of commitment, and cases may be put in which they ought not to be granted, 3 Bulst. 272. See *Slater v. Slater*, 1 Lev. 1. *Rex v. Flower*, 8 T. R. 324. *Burdett v. Abbott*, 14 East, 110.

(c) *Hobhouse's case*, 3 B & A. 422. 2 Chit. Rep. 207. s. c.

(d) 31 Car. 2. c. 2. See 1 & 2 P. & M. c. 13. 44 Geo. 3. c. 102. 43 Geo. 3. c. 140.

(e) *Rex v. Bowen*, 5 T. R. 158. Nbl. Rep. 186. s. c.

When  
and how  
granted.

In case of  
delay of  
prosecution.

Offence  
must be  
specified in  
the warrant  
of commit-  
ment.

The court  
will ex-  
amine the  
depositions.

the case of high treason, where the party had been committed on the warrant of the Secretary of State, after the lapse of a year without prosecution, the court discharged the prisoner upon adequate security. (f) And a similar rule holds, as to bailing in cases of delay in prosecutions for felony, or any inferior offence. (g)

Before the authority of justices of the peace was established, it was the custom for constables to carry offenders to gaol without any warrant of commitment; but it is now an established rule that, in order to authorize the commitment of a party, the *mittimus* must be under the hand and seal of the magistrate; and, therefore, if there be no warrant of commitment, bail will be invariably accepted. And where there is a warrant of commitment, it ought to set forth the crime specially, that the court may judge whether or not the crime be one of such a nature for which the prisoner ought to be admitted to bail. (h)

In a modern case, (i) it was stated to be a general rule, that upon application to be admitted to bail upon a *habeas corpus*, the court will require the depositions taken before the magistrate to be produced, and will from them form a judgment whether enough is charged to justify a detainer of the prisoner and put him on his trial. The settled and uniform practice, therefore, is, that even if the warrant of commitment be regular, the court will still look into the depositions to ascertain if there be sufficient

(f) King v. Wyndham, 1 Stra. 4.

(g) Andr. 64. 65. See Rex v. Delamere, Comb. 6. Crosby's case, 12 Mod. 66. Lord Aylesbury's case, 1 Salk. 103. 4 Inst. 71.

(h) Per Pratt, C. J. 2 Wils. 158. Rex v. Kendal, Salk. 347. Raym. 65. s. c. 5 Mod. 78. s. c. 12 id. 82. s. c.

(i) Cald. 295. Rex v. Horner, 1 Leach, C. L. 270.

grounds to detain the party in custody; and although the warrant of commitment is informal, and a serious offence is shewn to have been committed, they will not discharge or bail the prisoner without also first examining the depositions to see whether there is sufficient evidence to remand him to prison. Hence, where it is uncertain, both from the depositions and commitment, whether a felony is committed and charged against the prisoner; if it appear that the defendant has been guilty of a great misdemeanor, the court will require very ample securities. (k) So, where a person is charged with murder by the verdict of the coroner's inquest, we have seen he may be admitted to bail, and consequently that a *habeas corpus* would be granted, if it appear from the depositions to amount only to manslaughter; but not where the grand jury have found a true bill. The reason for this distinction may be, that in the first case, the court have the depositions to examine; whereas, in the latter case, the evidence is secret, and does not admit of a summary revision. (l)

When  
and how  
granted.

The court  
will ex-  
amine the  
depositions.

Persons accused of treason or felony, plainly expressed in the warrant of commitment, or as accessory, or on suspicion of being accessory before the fact to any petit treason or felony, or upon suspicion of such petit treason or felony, plainly expressed in the warrant, cannot be bailed upon a *habeas corpus*; (m) and if any person wilfully neglect, for the space of two terms, to apply for his enlargement, he shall not have a *habeas corpus* granted in

When not  
granted.

(k) Andr. 64, 65. See *Rex v. Delamere*, Comb. 6. Crosby's case, 12 Mod. 66. Lord Aylesbury's case, 1 Salk. 103. 4 Inst. 71.

(l) *Rex v. Dalton*, 2 Stra. 911. *Rex v. Magrath*, id. 1242. See *Rex v. Tothill*, 1 Sid. 316. 1 Bulst. 85. 3 id. 113. *Rex v. Horner*, 1 Leach, C. L. 270.

(m) 31 Car. 2. c. 2. s. 21.

When not  
granted.

vacation, but must wait till the commencement of the ensuing term; (n) and persons convicted, or in execution, (o) or in custody in a civil action, (p) are not entitled to this writ, either in term time or vacation. When an individual has been committed under a rule of court for a contempt, it is said that he is not entitled to avail himself of the general privilege conferred by this act. (q)

Although the warrant of commitment be informal and defective, yet if the *corpus delicti* appear on the depositions returned to the court, they will not relieve the prisoners by granting the writ. (r) As where a felony was distinctly and positively charged, they refused to bail on the *habeas corpus*, although an *alibi* was supported by the strongest evidence, (s) and the court refused to examine whether a criminal had been committed for the same offence of which he had been formerly convicted. (t) And, it has been seen, that the ill health of the prisoner is not of itself a sufficient ground to induce the court to interpose. (u) So an application for a *habeas corpus* to bail a person who had received stolen goods was refused, the defendant's affidavit admitting the receipt of the

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(n) 31 Car. 2. c. 2. s. 4.

(o) Where a prisoner was brought up to the Court of King's Bench, by *habeas corpus*, upon a commitment by a justice of the peace, who had cognizance of the cause, it was said that he was not bailable until the order was quashed, because until then he was in execution. Anon. 11 Mod. 45.

(p) 31 Car. 2. c. 21. s. 3.

(q) Rex v. Flower, 8 T. R. 324. Bac. Abr. Hab. Cor. b. 4. Com. Dig. Hab. Cor. C. Vide ante, 519.

(r) Rex v. Marks, 3 East, 157. Cald. 295. Rex v. Horner, 1 Leach, C. L. 270. Rex v. Judd, id. 484. 2 T. R. 257. s. c.

(s) Rex v. Greenwood, 2 Str. 1138.

(t) Rex v. Acton, 2 Str. 851. see Barnard, K. B. 250.

(u) Rex v. Wyndham, 1 Str. 4, 5. Rudd's case, 1 Leach Cr. Law, 117. In one case, however, (Rex v. Bishop, 1 Str. 9.) a person convicted of a libel was admitted to bail on account of the very precarious state of his health.

stolen goods, but denying that he was aware at the time that they had been stolen. (x)

When not  
granted.

A *habeas corpus* will not be granted to bring a party before the court, who has been committed by the House of Lords or Commons. (y)

A prisoner confined in Newgate for high treason in North America, who is only triable before the King's Bench or under a special commission, cannot be admitted to bail under the *habeas corpus* act by justices of the gaol delivery, or discharged by their proclamation for want of prosecution. (z) And persons who are committed to the Tower for a similar offence, cannot make their prayer at the Old Bailey, under this statute, to be admitted to bail. (a)

The writ of *habeas corpus* in term, may be obtained in the Court of Chancery, King's Bench, Common Pleas, or Exchequer, or if in vacation, from the Lord Chancellor, or one of the judges; (b) and to entitle a party to the benefit of this writ, his prayer must be entered in the court where he ought to be sued; (c) but after the assizes are proclaimed for the county where the prisoner is detained, he can only be removed by application to the judge of assize. (d)

By whom  
granted.

If the writ be improperly refused in the vacation, the

(x) 1 Chit. Cr. Law, 130.

(y) Sir Francis Burdett v. Abbott, 14 East, 110. 150. Rex v. Flower, 8 T. R. 314. Hobhouse's case, 3 B. & A. 420. 2 Chit. Rep. 207. s.c.

(z) Rex v. Platt, 1 Leach, C. L. 157.

(a) Fortes. 101. See Rex v. Kimberley, 2 Stra. 848. Rex v. Hutchinson, 3 Keb. 785.

(b) 31 Car. 2. c. 21. s. 2.

(c) Rex v. Leason, 1 Ld. Raym. 61. See Witham v. Dutton, Comb. 111. In Rex v. Leason, it is stated that the prisoner must enter his prayer, according to the *habeas corpus* act, in the same county where he ought to be tried; as the King's Bench does not hold plea originally of a felony arising out of Middlesex.

(d) 31 Car. 2. c. 2.

By whom  
granted.

judge is liable to a penalty of 500*l.*; (e) and it has been observed, that the *habeas corpus* act also renders the judges in such a case liable to an action, at the suit of the party aggrieved. (f)

How ob-  
tained.

The application for a *habeas corpus* must be made in writing by the prisoner, or some person on his behalf, attested and subscribed by two witnesses; and a copy of the warrant of commitment must be produced before the court or judge, or an oath made that such copy was refused. (g) An affidavit must also be made, disclosing the circumstances under which the applicant considers himself entitled to relief; for if the writ were allowed to issue upon an unauthenticated request, any person, even a felon, when under sentence of death, might procure a temporary suspension of his confinement. (h) In term the motion must be made by the prisoner's counsel, and in vacation his solicitor lays the necessary documents before a judge at chambers, accompanied in either case with a copy of the warrant, or an affidavit that it has been de-

(e) 31 Car. 2. c. 2. s. 10.

(f) Hawk. P. C. b. 2. c. 15. s. 24.

(g) 31 Car. 2. c. 2. s. 3: The 5th section directs that the copy shall be delivered within six hours after demanded. In the construction of this section, it has been determined, that if the governor be present, there is then, in contemplation of law, considered to be no deputy or under-keeper on whom a service of the demand can be legally made; but if the governor be not present, then the deputy may be served; and if the deputy have no deputy, then, in the absence of the deputy, service may be on the turnkey, or may be left at the gaol, for it is the duty of the governor to leave some person in his place. But if the gaoler be in the gaol, and accessible, the demand must be made on him; if he be not accessible, it may be on the deputy. And at all events, the demand should be served in such a manner, that the person to whom it was delivered, should understand its nature; and where the governor is within the gaol, some endeavour should be made to ensure its being delivered to his hands. *Huntley v. Luseombe*, 2 Bos. & Pul. 530.

(h) *Penrice & Wynn's case*, 2 Mod. 306. *Slater v. Slater*, 1 Lev. 1. *Hobhouse's case*, 3 B. & A. 420. s. c. 2 Chit. 207. Anon. E. T. 1823. C.P. MS. See form of affidavit, Hand's Prac. 529.



nied; and the writ, it is said, will not be granted on the mere deposition of the prisoner, but other confirmatory evidence must be adduced.

How obtained.

When a motion is made to the court, upon just cause being shewn, a rule is granted for the writ to issue; and when the application is made to a judge at chambers, he grants his *fiat* upon which the clerk in court makes out the *habeas corpus*, and delivers it to the solicitor of the applicant.

The signature of the judge awarding the writ must be subscribed; (i) and it has been held, that if this formality be not complied with, the writ is altogether a nullity, and obedience to it cannot be enforced; (k) and in order that no one should plead ignorance of its nature and contents, the statute directs that it shall be marked in the following manner: "*per statutum tricesimo primo Caroli secundi regis.*" (l)

Form and requisites of the writ.

This writ must be made returnable *immediate*, before the person who awarded it, or any other judge.

The writ must be directed to the officer in whose custody the applicant is actually detained. (m) A *habeas corpus* directed in the disjunctive to the sheriff or gaoler, is irregular; therefore, where a party is arrested by a warrant of the sheriff, the writ must be addressed to him, for, in contemplation of law, the prisoner is in his custody, and the writ must be returned with the body; but when the prisoner has been immediately committed to the custody of the gaoler, it must be directed and delivered to the latter. (n)

To whom directed.

(i) 31 Car. 2. c. 2. See 1 & 2 P. & M. c. 13. s. 7.

(k) Cowp. 672.

(l) 31 Car. 2. c. 2.

(m) Godb. 44. Bac. Ab. Hab. Cor. b. 6.

(n) Rex v. Fowler, 1 Salk. 350. 1 Ld. Raym. 586. 618. s. c. Bac. Ab. Hab. Corp. C.

To whom  
directed.

Writ, how  
returned.

“ After the *habeas corpus* has been served on the officer, or any other person who detains the applicant in his custody, or left at the gaol or prison with any of the under-keepers or deputy of the officers or keepers, the party to whom the writ is awarded, shall, unless the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment, upon payment or tender of the charges of bringing up the prisoner, not exceeding one shilling per mile, upon security being given by his own bail to pay the charges of carrying him back, if he shall be remanded by the court or judge to which he shall be brought, (o) and that he will not make any escape by the way, make return of such writ, and bring the body of the party under restraint before the Lord Chancellor or Lord Keeper for the time being, or the judges or barons of the court, from whence the writ of *habeas corpus* issued, or the other magistrates before whom it was made returnable ; and at the same time shall certify the true causes of his detainer or imprisonment, within three days after the writ has been served upon him, unless the commitment of the party be in any place beyond the distance of 20 miles from the place where it is to be returned ; and if beyond the distance of 20 miles, and not above 100 miles, within the space of 10 days ; and if beyond the distance of 100 miles, within the space of 20 days after such delivery. (p) And if the party to whom it is directed, refuse to return it within the specified time, he is liable, for the first offence, to a penalty of 100*l.*, and for the second, to a penalty of 200*l.*”

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(o) It is said to be no excuse for not complying with the requisition of the writ, that the prisoner has not paid the gaoler the charges allowed by the act for his conveyance, but the court will allow them on the return. *Rex v. Armigers*, 1 Keb. 272. 280. See 55 Geo. 3. c. 50.

(p) 31 Car. 2. c. 2. s. 2.

Although the body of the prisoner is usually returned with the writ, the reasons for the prisoner's detention are, however, sometimes returned without actually bringing up the applicant; as where he is charged with treason or felony, clearly expressed in the warrant of commitment, or imprisoned for any civil cause of action, or in execution; and in either case, the return must distinctly shew by whom and for what cause the prisoner was committed; (q) but it will not be rendered invalid by mere want of form, if it discloses a good cause of detainer, (r) though a return to a writ of *habeas corpus*, stating "that on due proof the offender was committed," was holden insufficient, and that the exact kind of proof should have been disclosed. (s)

Writ how  
returned.

The method of compelling a return was formerly by taking out an *alias* and *pluries*, but these writs are seldom necessary, as an attachment will immediately issue on the first refusal. (t)

The prisoner's remedy for a false or improper return, is by an action on the case against the officer, to recover damages, and by indictment. (u)

"When a writ of *habeas corpus* has been granted, and a

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(q) *Lawson's case*, Cro. Car. 507.

(r) *Rex v. Bethel*, 5 Mod. 19. Salk. 348. s. c. 1 Ld. Raym. 47. Com Dig. Hab. Corp. E. 2. Palm. 558. See *Rex v. Suddis*, 1 East, 316. *Rex v. Marks*, 3 id. 157.

(s) *Nash's case*, 4 B. & A. 295.

(t) *Rex v. Winton*, 5 T. R. 89. Bac. Ab. Hab. Cor. B. 8. The statute 56 Geo. 3. c. 100. which was passed in order to extend the benefits of the *habeas corpus* to civil as well as criminal cases, enacts, that any disobedience to such writ shall be a contempt of court; and also provides, that the several provisions within that act, as to the punishment of persons disobeying writs of *habeas corpus*, should extend to all writs of *habeas corpus*, awarded in pursuance of the act 31 Car. 2. c. 2. and the acts passed in Ireland in the 21st and 22d years of George the Third, in as ample and beneficial a manner as if such writs and the said cases arising thereon, had been hereinbefore specially named and provided for respectively.

(u) ——— *v. Cowper*, 6 Mod. 90. Bac. Ab. Hab. Corp. B.

Proceedings  
subsequent  
to the re-  
turn.

return made by the person to whom it was directed, the Lord Chancellor or Lord Keeper, or such justice or baron before whom the prisoner shall be brought, shall, within two days discharge him from his imprisonment, on proper sureties for his appearance, if it appear that the cause is bailable; and if not, the prisoner must be remanded." But it is said, that a commitment to the Marshalsea is a sufficient remanding to answer the intent of the statute; and it has been ruled, that the King's Bench may remand him to the same gaol from whence he came, and order him to be brought up from time to time, until they have determined to discharge, or detain him in prison; (x) or may during a reasonable time bail the prisoner *de die in diem*, until they have come to a decision. (y)

Upon the writ being returned, the counsel for the prisoner may move to file the return; and that the prisoner may be called into court and the return read, after which the counsel may proceed to argue the illegality of the commitment, and his right to be discharged on bail.

Of the re-  
cognizance.

If the court or judge determine that the party shall be released from custody, he must thereupon enter into a recognizance to appear on his trial, and the writ, the return, and the recognizance must be certified into the court where the trial is to take place. (z)

In a former part of this work, (a) the number, sufficiency, and notice of bail, have been already considered. It may be, however, stated as a general rule, that although bail on a *habeas corpus* may be taken at the discretion of the court, the security demanded must be

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(x) Bac. Ab. Hab. Corp. B. 13. Anon. Vent. 530. Peyton's case, id. 846.

(y) Rex v. Bethell, 5 Mod. 19. Bac. Ab. Hab. Corp. B. 13.

(z) 31 Car. 2. c. 2. s. 3.

(a) Vide ante, p. 504, 5, 7.

consistent with the quality and opulence of the prisoner; as requiring bail which he is unable to procure, amounts to an exaction of excessive bail; and subjects the party demanding it to the penalties which have been already specified. (b)

Of the  
amount of  
bail.

## CHAPTER IX.

### OF BAIL ON WRIT OF CERTIORARI.

WRITS of *certiorari* are sued out to certify and remove an indictment, and all the proceedings incident to it, from an inferior jurisdiction, in which the prosecution may have been originally commenced, into the Court of King's Bench. These writs may be issued at any time prior to, or during the trial. (a)

The Court of King's Bench having a general superintendence over all courts of inferior jurisdiction, may award a *certiorari* to remove the proceedings from any of them, except where some particular statute or charter invests them with peculiar privileges. (b) But this court will not, in general, at the instance of a defendant, grant a *certiorari* to remove proceedings from any of the higher tribunals, without strong grounds being produced as a reason for the application. (c)

When  
granted.

(b) Vide ante, p. 513.; and see 2 Wils. 159.

(a) 4 Bl. Com. 320. Hand. Prac. 37. Vide post, 530. If there be an indictment to be removed, and the party be in custody, it is usual to have a *habeas corpus* to remove the prisoner, and a *certiorari* to remove the record; for without the former, the defendant must continue in the same custody. See 1 Cowp. 283. 1 Salk. 149.

(b) Com. Dig. Certiorari, A. 1. Bac. Ab. Certiorari, B. 12. Mod. 386. Carth. 494.

(c) Anon. 1 Salk. 144.

When  
application  
should be  
made.

The proper time for either party to apply for a writ of *certiorari*, is before issue is joined on the indictment. But this writ will not be in general granted when issue has been joined and a *verdict* awarded; (d) and still less after the jury have been sworn. (e) And without very special cause shewn, it will not be issued after conviction (f) or confession; (g) because the court, before whom the trial has taken place, must be regarded as most competent to judge what penalty should be inflicted.

Of taking  
the recogni-  
zance.

It is enacted, (h) "that on granting a *certiorari* to remove an indictment or presentment, all parties indicted prosecuting such *certiorari* shall, before the allowance thereof, find two sufficient manucaptors, who shall enter into a recognizance before a justice of the King's Bench, (who shall endorse the same on the writ); or before a justice of the peace of the county or place, in 20*l.*; with a condition, at the return of the writ, to appear and plead to the indictment or presentment in the King's Bench; and at his own costs and charges to cause issue to be joined thereon, or any plea relating thereto, to be tried at the next assizes for that county after such *certiorari* shall be returned, or the next term, if in London, Westminster, or Middlesex, unless other time or place be appointed by the court; and to give due notice of trial to the prosecutor; and to appear, from day to day, and

(d) Bac. Ab. *Certiorari*, A.

(e) *Rex v. Elwell*, 2 *Ld. Raym.* 1515. 1 *Str.* 794. s. c.

(f) *Regina v. Bethell*, 6 *Mod.* 17. *Carth.* 6. *Regina v. Porter*, 1 *Salk.* 149. *Rex v. The Inhabitants of Sutton*, 7 *T. R.* 375.

(g) *Rex v. Gwynne*, 3 *Burr.* 749. *Williams v. Certiorari*, 9.

(h) 5 & 6 *W. & M.* c. 11. 8 & 9 *W. & M.* c. 35. See 5 *Geo. 2.* c. 19. 34 *Jas. 1.* c. 8. s. 6 & 7. See *Rex v. Mucklow*, 1 *Keble.* 225. 4 *Hawk. P. C.* 291. 4 *Bac. Ab.* 337. *Rex v. Fimble*, 8 *T. R.* 409. n. 2. *Rex v. Lyon*, 3 *Burr.* 1461. By the 5th sect. 3 *W. & M.* c. 11. the Rte in effect is enacted, concerning the removal of indictments by *Certiorari* within the counties of Chester, Lancaster, and Durham: See Form of Recognizance, William's Justice, *Certiorari*, 6. *Hand. Prac.* 354.

not to depart until discharged by the court. It is further provided, that such recognizances shall be certified into the Court of King's Bench, with the *certiorari* and indictment, and be there filed; and that the recognizance shall not be discharged until the sum recovered be paid.

Of taking  
the recog-  
nizance.

After the recognizance has been acknowledged, the solicitor delivers it with the writ of *certiorari* to the clerk of the peace at the sessions; or clerk of the arraigns at the Old Bailey; or clerk of the assize at the assizes; who must return it without delay, or he may be proceeded against by attachment. (i)

The regulations introduced by these statutes extend only to the removal of indictments from the sessions, and do not affect an indictment at Hicks's Hall, or before justices of *oyer* or *terminer*, or gaol delivery; (k) and even at the sessions, as these statutes are in the affirmative as to the taking of recognizances, they do not divest the justices of the King's Bench of their common law authority; and therefore, if a judge, granting a *certiorari* should take a recognizance inconsistent with the form prescribed by these acts, either as to the sum or condition, such recognizance will be as effectual as if the statutes had not been passed; but it has been remarked, that in such case the *certiorari*, if procured by the defendant, will not operate as a *supersedeas*, as the statutes distinctly declare, that the sessions may proceed, notwithstanding any *certiorari* procured by a defendant,

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(i) *Hand's Prac.* 30. 39. A recognizance taken by a justice of the peace ought to be certified by the justice only, till it be made a record of the sessions, after which it ought to be certified in the same manner as the other records of the sessions. *Bac. Ab.* 357.] *Ford v. Rex*, Cro. Jac. 669.

(k) *Rex v. Lyon*, 3 Burr. 1462. *Rex v. Sidney*, 2 Str. 1165. *Rex v. Fonseca*. 1 Burr. 10.

Of taking  
the recog-  
nizance.

Of the suf-  
ficiency of  
the bail.

What will  
be a dis-  
charge of  
the recog-  
nizance.

whereon such recognizance is not given as is expressly described. (l)

- If the persons offering to be sureties appear to be worth 20*l.*, the justices cannot refuse them; (m) and if several persons be included in the same indictment, and some of them find sureties, and the others not, it is said, that the proceedings as to the first will be valid. (n)

It may be stated as a general rule, that the same causes that have been already mentioned, as operating to discharge other recognizances, (o) hold equally as reasons for the exoneration of the bail upon removal of indictments by *certiorari*.

But even although the principal may have appeared in compliance with the terms of the recognizance, the bail will, in some cases, be liable to costs, as the statute 5 & 6 William and Mary, enacts, "that if the defendant prosecuting a *certiorari* from the sessions, be convicted, (p) the King's Bench shall give reasonable costs to the prosecutor, if he be *the party grieved or injured, or a justice of the peace or other civil officer, who prosecutes by virtue of his office, to be taxed according to the usual practice of the courts; and if they be not*

(l) Hawk. b. 2. c. 27. s. 53. William's J., *Certiorari*.

(m) Hawk. P. C. B. 2. c. 27. s. 50. Com. Dig. *Certiorari*, B. March, 27. 2 Hawk. 292.

(n) Hawk. P. C. b. 2. c. 27.

(o) Vide ante, p. 215.

(p) In the construction of this statute it has been holden, that the term "convicted," means convicted by *judgment*, and that, consequently, though after the removal, the defendant be found guilty by a jury, yet, if the judgment be afterwards arrested, no costs can be taxed for the prosecutor. 15 East, 570. See 1 Hale, P. C. 686., where Lord Hale, commenting upon the stat. 5 Eliz. c. 14. against the forging or making false deeds, &c., by which a person committing a second offence, after his conviction or condemnation of a former one, shall be deemed guilty of felony without benefit of clergy, has these words: "By conviction, I conceive is intended, not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment."



paid after ten days, subsequent to demand, an attachment shall issue, and the recognizance shall not be discharged until the costs are satisfied." Though, if a defendant and two sureties enter into a recognizance in a sum exceeding 20*l.*, it is a recognizance at common law, and not within the 5 & 6 W. & M. c. 11. (q) So a recognizance to remove an indictment from a court of *oyer and terminer* will be discharged upon the terms thereof being complied with, and will not be ordered to stand as a security for the costs of the prosecutor. (r) So where the defendant and two other persons entered into a recognizance upon removing an indictment (which was for an assault with intent to ravish) from Hicks's Hall, (s) where it was originally found, after the defendant had been tried, convicted, and fined, in the Court of King's Bench, and paid his fine, a rule was made absolute to discharge his recognizance. (t) But if a recognizance, entered into upon defendant's removing an indictment from a court of *oyer and terminer*, become forfeited by the defendant's neglecting to proceed to trial pursuant to the condition thereof, the court will not discharge it till the costs taxed for the prosecutor, on account of such neglect, are paid, notwithstanding the defendant was in custody upon an attachment for the non-payment of those costs, and had been acquitted on the trial of the indictment (u)

What will  
be a dis-  
charge of  
the recog-  
nizance.

(q) Bac. Ab. Certiorari, D. Rex v. Sidney, 2 Str. 1165. 3 Burr. 1463.


(r) Rex v. Sidney, 2 Str. 1165. See Rex v. Fonseca, 1 Burr. 11. Rex v. Lyon, 3 id. 1463.

(s) The session of Hicks's Hall sit in two capacities; viz. of sessions of the peace, and also of *oyer and terminer*, and they draw up their orders with the one title or with the other, according to the degree of the offence, viz. common assaults and offences of an inferior nature, under the title of the court of sessions; and assaults with intent to ravish, riots, &c. and offences of high nature, under the title of a court of *oyer and terminer*, and the writs of *certiorari* are directed accordingly. The present *certiorari* was directed to them as a court of *oyer and terminer*. Rex v. Fonseca, Burr. 11.

(t) Rex v. Fonseca, 1 Burr. 10.

(u) See Rex v. Lyon, 3 Burr. 1461.

What will  
be a dis-  
charge of  
the recog-  
nizance.



Upon the removal of an indictment by certiorari from the sessions, into the Court of King's Bench, we have seen that a prosecutor is not entitled to costs, unless he be either the party really injured, (x) or a civil officer, prosecuting those offences which are strictly incidental to his official capacity.

The prosecutor of an indictment for stopping up a public footway, which he has been accustomed to use, has been held to be a party injured within the statute; (y) and so have persons who prosecuted a defendant for keeping a steam engine, emitting noxious vapours near their houses; (z) but a person who preferred an indictment merely for an attempt to commit a crime, and a justice of the peace who prosecuted a gaoler to conviction, for suffering a charged felon to escape, were held not to be individually injured within the meaning of the act. (a) It has, however, been since determined, that a justice of the peace who indicts a road for being out of repair, is entitled to costs under this statute; for though this indictment might have been prosecuted by a private individual, as well as by a magistrate, it was nevertheless instituted as part of the prosecutor's duty. (b)

The Court of King's Bench having the King's privy seal for that purpose, may give the third part of the fine imposed upon a defendant after conviction, upon an indictment in that court, to the prosecutor, by way of re-

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(x) The not endorsing the prosecutor's name upon the indictment, does not affect his title to costs, provided it be proved that he is a person comprehended within the third section of the statute of 5 & 6 W. & M. *Rex v. Smith*, 1 Burr. 54. See *Rex v. Kettleworth*, 5 T. R. 33. s. c. *Nol. Rep.* 153. See vide *Rex v. Sharpness*, 2 T. R. 47.

(y) *Rex v. Williamson*, 7 T. R. 32.

(z) *Rex v. Dawsnap*, 16 East, 199.

(a) *Rex v. Strong*, 1 Wils. 139. *Rex v. Smith*, 1 Burr. 54. *Rex v. Sharpness*, 2 T. R. 47.

(b) *Rex v. Kettleworth*, 5 T. R. 33. s. c. *Nol. Rep.* 153. *Rex v. Williamson*, 7 T. R. 32. *Rex v. Dawsnap*, 16 East, 194.

imbursing him the costs of the prosecution. But if the prosecutor of an indictment has received a third part of the fine, and then applies for his costs, under the recognizance entered into by the defendant, pursuant to the 5 & 6 W. & M., upon removing the indictment by certiorari, the court will order what he has received to be deducted from the amount of the taxation; (c) but in general the payment of the fine does not discharge the recognizance for the costs. (d)

What will  
be a dis-  
charge of  
the recog-  
nizance.

It has been held, that the master of the crown-office ought only in his taxation to include the costs subsequent to the issuing of the writ. (e)

If the defendant forfeit his recognizance, by not proceeding to trial at the time specified, it will not be discharged on the application of the bail, until the costs of not proceeding to trial have been paid, notwithstanding the defendant be afterwards acquitted, and taken in execution for the amount of the taxation. (f) And if the costs exceed the sum named in the recognizance, the obligation of the bail will not be discharged by payment of the sum originally specified, but it will remain in force until the whole amount is satisfied to the prosecutor. (g) As the costs, when duly ascertained by the master, become a vested debt, it has been determined, that under the statute of 5 & 6 W. & M., the personal representatives of the prosecutor of an indictment, are entitled to the costs taxed during the life of the latter, although no per-

(c) *Rex v. Gouer*, 1 Keb. 478. 2 Hawk. P. C. 6th ed. 301. 3 T. R. 512. *Rex v. Osborne*, 4 Burr. 2125. Vide *Regina v. Summers*, 1 Salk. 55. 3 id. 105. 2 Ld. Raym. 854. *Rex v. Sydney*, 21 Str. 1165.

(d) *Bac. Ab. Certiorari*, D. Hawk. P. C. 62, c. 27, s. 53.

(e) *Regina v. Summers*, 1 Salk. 55. 3 id. 104, s. c. 2 Ld. Raym. 854. *Bac. Ab. Certiorari*, D.

(f) *Rex v. Lyon*, 3 Burr. 1461. *Rex v. Turner*, 15 East, 572. *Bac. Ab. Certiorari*, D.

(g) *Rex v. Teal*, 13 East, 4. *Rex v. Turner*, 15. id. 572.

What will  
be a dis-  
charge of  
the recog-  
nizance.



sonal demand was ever made by him. In such cases, however, the court will not grant an attachment against the defendant for non-payment of costs, but make a rule for estreating his recognizance. (h) And where a defendant has been found guilty on an indictment, which has been removed by him by *certiorari* under the usual recognizance, required by this statute, and has afterwards died between the verdict and the day in bank, his bail will be liable to the costs of the prosecutor. (i)

## CHAPTER X.

### OF ESTREATING THE RECOGNIZANCE.

THE various causes which operate as a discharge of the recognizance, have been already considered. If any of the conditions of that instrument be not complied with, it becomes liable to be estreated (that is, taken out from among the other records, and sent up to the Exchequer), which renders the party an absolute debtor to the crown for the sum or penalty therein mentioned. (k) But as a forfeiture of that security is frequently incurred through mere inattention and ignorance, the statute of 4 Geo. 3. c. 10. empowers the barons of the Exchequer to relieve, on petition, any person whom they may deem a proper object for indulgence.

(h) *Rex v. Chamberlayne*, 1 T. R. 104. *Rex v. Turner*, 15 East, 573. *Emerson v. Lashley*, 2 H. Bl. 252.

(i) *Rex v. Finmore*, 8 T. R. 409.

(k) *Bac. Ab. Bail in Criminal cases*, L.

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